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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 306
Consolidated With No. 307.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLANT.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	4
Summary of Argument	10
1. Common Management or Control	11
2. Through Routes	13
3. Section 3 Violations	14
4. Requirements of Section 15(4) Satisfied	15
Argument	
I. The S.P.&S. System Cannot, Within the Meaning of Section 15(4) of the Interstate Commerce Act Be Operated Under Common Management or Control with Each of Two Independent, Competing Railroads, Neither of Which Has a Controlling Interest in the S.P.&S. System or Any Interest in the Other	17
A. The Legislative History and Language of Section 15(4) Discloses That Congress Intended the Words "Common Management or Control" to Mean Control by One Railroad of Another, and Not Joint Control by Minority Interests	18
B. The Enactment in 1940 of Section 1(3)(b) and the Explanation by Congress Why It Did Not Broaden the Meaning of "Control" in Section 15(4) Confirm That "Common Management or Control" as Used Therein Must Be Narrowly Construed and Does Not Embrace Joint Control by Minority Interests	22

C. The District Court's Conclusion That the S.P.&S. System Can Be and Is Under Common Management or Control with Each of the Northern Lines Within the Meaning of Section 15(4) Is Based Upon Patently Erroneous Premises 31

1. The Commission in Rate-Making Cases Has Not Consistently Applied the Traffic Policy Control Test to Question of Management or Control 32

2. In Section 15(4) Cases, Railroads Have Been Held Under Common Management or Control Only When One Railroad Has Stock Control of Another 34

3. The Commission's Decisions in Rate Cases Involving Joint Control Have No Precedential Value in Section 15(4) Cases 37

4. The District Court's Reliance Upon a Non-Existent Pattern in Rate-Making and Through Route Cases Led It to an Erroneous Concept of Congressional Intent 47

5. An Interpretation of "Common Management or Control" to Exclude Joint Management or Control Would Not, as Feared by the Court, Disturb the Over-All Plan of Railroad Regulation or Deprive Railroads of the Economies of Joint Operation 48

D. The Undisputed Evidence Proves That Neither the Great Northern Nor the Northern Pacific Is Under Common Management or Control with the S.P.&S. System .. 51

E. Summary of Part I 56

II. Through Routes Already Exist Via the S.P.&S. System and the Milwaukee Making Section 15 (4) Inapplicable 57

III. The Short Haul Restrictions of Section 15(4) Are Also Inapplicable Because the Conduct of the S.P.&S. System in Refusing Joint Rates Via the Milwaukee's Route Between the Twin Cities and Spokane Is a Violation of Section 3. 67

IV. Assuming Arguendo That Section 15(4) Is Applicable, the Requirements Thereof Are Fully Satisfied 74

Lumber and Forest Products 78

Grain 86

Fresh Fruits and Vegetables 88

Furniture 90

Iron and Steel Grain Bins 92

Agricultural Implements 95

Livestock 96

General 99

Conclusion 103

Appendix A

Statutes Involved 105

Appendix B

Map of Milwaukee Railroad 111

Appendix C

Map of S.P.&S. Railway 112

INDEX OF CITATIONS.

Cases.

Absorption of Switching Charges, 157 I. C. C. 129.... 12, 28
Alabama T. & N. R. Corp. v. Southern Ry. Co., 148 I. C. C. 708..... 34
Arizona Packing Co. v. A. E. R. R. Co. 81 I. C. C. 115.. 32
Asphalt Between Calif. Points and to Salt Lake City, 268 I. C. C. 682..... 67
Atlantic Coast Line R. Co. v. United States, 284 U. S. 288 35
Birmingham Slag Co. v. Blue Ridge Ry. Co., 201 I. C. C. 554..... 33
Blackshear Mfg. Co. v. A. C. L. R. R. Co., 87 I. C. C. 654 32
Central of Georgia Ry. Co. Control, 307 I. C. C. 39.... 53
Chicago M. & St. P. Ry. v. Minn. Civic Assn., 247 U. S. 490 ..... 39, 40, 42
City of Astoria v. S. P. & S. Ry. Co., 38 I. C. C. 16.... 45
City of Spokane, Wash. v. N. P. Ry. Co., 19 I. C. C. 162 46
Coal & Coke Ry. Co. v. Conley (8 Ct. W. Va.), 67 S. E. 613 20
Coast Packing Co. v. Gilmore & P. R. Co., 218 I. C. C. 507 49
Consolidated Mining & S. Co. of Canada v. N. Y. C. R. Co., 299 I. C. C. 231..... 73
Construction of Railroad Lines in Eastern Oregon, 111 I. C. C. 3; 124 I. C. C. 529..... 47
Control of Northwestern P. R. Co., 150 I. C. C. 119.... 38
Denver & R. G. W. v. Union P. R. Co., 287 I. C. C. 611 .62, 85

Denver & R. G. W. R. Co. v. Union P. R. Co., 351 U. S. 321 ..... 14, 60, 63, 64, 67, 85, 100, 102

Denver & R. G. W. R. Co. v. United States, 131 F. Supp. 372 (D. Col.) 63

Des Moines Union Railway Switching, 231 I. C. C. 631 ..... 38, 39

Dixie Carriers v. United States, 351 U. S. 56 ..... 15, 73

Dublin & Laurens County C. of C. v. Macon, D. & S. R. Co., 234 I. C. C. 415 33

Eriksen v. A. A. R. R. Co., 102 I. C. C. 374 38

Flour City S. S. Co. v. L. V. R. R. Co., 24 I. C. C. 179 20

General Mills v. Chicago R. I. & P. Ry., 185 I. C. C. 789 6

General Mills, Inc. v. Great Northern Ry. Co., 269 I. C. C. 457 58

Georgia & F. R. v. Atlantic Coast Line R. Co., 191 I. C. C. 489 35

Great Northern Railway Co. v. United States, 361 U. S. 860 72

Great Northern Railway Co. v. United States, 362 U. S. 939 72

Great Northern Railway Company v. United States, 172 F. Supp. 705 (D. Minn.) 15, 34, 72

Great Northern Ry. Co. v. United States, 81 F. Supp. 921 (D. Del.); affirmed, 336 U. S. 933 ..... 59, 102

Gulf Refining Co. v. Fox, 11 F. Supp. 425 (S. D. W. Va.) 20

Helix Milling Co. Inc. v. Great Northern Ry. Co., 287 I. C. C. 77 ..... 55, 101

Houston Belt & Term. Ry. Co. Control, 275 I. C. C. 289 40

Hughes Creek Coal Co. v. K. & M. Ry. Co., 29 I. C. C. 671 ..... 12, 27

Humbard Construction Co. v. Southern Ry. Co., 161 I. C. C. 38 33
Independent Paper Stock Co. v. Chicago & A. R. Co., 168 I. C. C. 404 43
Inland Empire Shippers League v. Director General, 59 I. C. C. 321 45
Investigation of Alleged Unreasonable Rates on Meats, 23 I. C. C. 656 50
Justice Co. v. Holton I-U Ry. Co., 153 I. C. C. 673 43
Lemon Cove-Woodlake Asso. v. A. T. & S. F. Ry. Co., 139 I. C. C. 239 36
Livestock from Idaho to Interstate Destinations, 226 I. C. C. 225 49
Livestock, To, From, and Between Points in the Southeast, 91 I. C. C. 292 33
Louisville & Nash. R. R. v. United States, 242 U. S. 60 ..... 40, 41, 42
Lumber Rates from North Pacific Coast Points, 30 I. C. C. 111 37
Lumber Rates from Oregon and Washington to Eastern Points, 29 I. C. C. 609 20
Malleable Iron Range Co. v. Chicago, M. St. P. & P. R. Co., 253 I. C. C. 431 49
Manufacturers Ry. Co. v. Ahnapee & W. Ry. Co., 172 I. C. C. 554 ..... 12, 28, 43
Mayo Shell Corp. v. Baltimore & O. R. Co., 297 I. C. C. 133 72
Minneapolis Civic & Assn. v. Chicago, M. & St. P. Ry. Co., 158 N. W. 817 (S. Ct. Minn.) 42
New Haven Railroad v. Platt, 7 I. C. C. 323 4

Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co., 278 I. C. C. 519 60
Oregon Short Line R. Co. Acquisition, 217 I. C. C. 135 .. 49
Pacific Creamery Co. v. S. P. Co., 42 I. C. C. 93 32
Pacific Lumber Co. v. Northwestern Pac. R. Co., 51 I. C. C. 738 38
Pacific Coast R. R. Co. Control, 282 I. C. C. 600 77
Pillsbury-Astoria Flour Mills Co. v. Great Northern Ry. Co., 198 I. C. C. 642 45
Portland Chamber of Commerce v. O. R. R. & N. Co., 19 I. C. C. 265 ..... 44, 46
Port of New York Authority v. A. T. & S. F. Ry. Co., 144 I. C. C. 514 36
Preston-Shaffer Milling Company v. Great Northern Ry. Co., 304 I. C. C. 491 71
Raleigh Freight Traffic Bureau v. A. C. L. R. R. Co., 107 I. C. C. 156 33
Rates on Chert, Clay, Sand, and Gravel, 197 I. C. C. 215 33
Rate Structure Investigation, Part 13, Salt, 197 I. C. C. 115 48
Restriction in Routing Between Greenwood and Augusta, 165 I. C. C. 3 ..... 35, 36
Rochester Tel. Corp. v. U. S., 307 U. S. 125 24
Rochester Telephone Corporation v. United States, 23 F. Supp. 634 (W. D. N. Y.) 21, 23, 24
Roth Blum Packing Co. v. Southern Pac. Co., 204 I. C. C. 93 42
Routing from Points on S. C. D. & P. Ry., 142 I. C. C. 230 ..... 37, 77

Russ Market Co. v. Northwestern Pac. R. Co., 171 I. C. C. 117 38

St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136 ..... 4, 57

Seaboard Airline Railway Recs. v. Carolina & N. W. Ry. Co., 204 I. C. C. 416 36

Sheridan Chamber of Commerce v. C. B. & Q. R. R. Co., 26 I. C. C. 638 50

Sioux City and N. O. Barge Lines, Inc. v. Chicago & North Western Ry. Co., 303 I. C. C. 537 40

Southern Railway Company v. United States, 153 F. Supp. 57; affirmed 355 U. S. 283 60

Spokane International R. Co. Control, 295 I. C. C. 425 77

Spokane, P. & S. Ry. Co., 41 I. C. C. Val. Rep. 1 ..... 44, 46

Terminal Allowance to Minnesota Transfer, 268 I. C. C. 5 39

Texas & P. R. Co. v. United States, 289 U. S. 627 ..... 14, 69

The Ogden Gateway Case, 35 I. C. C. 134 37

Thompson v. United States, 101 F. Supp. 48 (E. D. Mo.) 61

Thompson v. United States, 343 U. S. 549 ..... 22, 60, 61, 67

Union Pacific R. Co. v. United States, 132 F. Supp. 72 (D. Neb.) 63, 68

United States v. Great Northern Ry. Co., 343 U. S. 562 ..... 14, 57, 60

United States v. Lake Shore & M. S. Ry. Co., 203 Fed. 295 (S. D. Ohio) 27

United States v. Marshall Transport Co., 322 U. S. 31 25

United States v. Union Pacific R. R. Co., 226 U. S. 61 .. 53

United States v. U. P. R. R. Co., 28 I. C. C. 518 36
U. S. v. American Ry. Exp. Co., 265 U. S. 425 ..... 11, 19
U. S. War Department v. A. & S. Ry. Co., 83 I. C. C. 742 35
Virginian R. Co. v. United States, 272 U. S. 658 ..... 13, 58, 59, 63
West Coast Lumbermen's Asso. v. C. M. St. P. Ry. Co., 129 I. C. C. 363 29
West Coast Lumber Mfrs. Asso. v. S. P. & S. Ry. Co., 45 I. C. C. 230 29
West Coast Lumber Mfrs. Asso. v. T. E. R. R. Co., 45 I. C. C. 227 ..... 36, 77
Western Pac. R. Co. v. Northwestern Pac. R. Co., 191 I. C. C. 127 ..... 36, 38, 75, 76
Wyoming Coal Co. v. Virginian R. Co., 96 I. C. C. 359 58

Statutes.

Bill of Lading Act (39 Stat. 538) 38
Communications Act (48 Stat. 1064) 23
Hepburn Act (34 Stat. 589) 18
Interstate Commerce Act (Title 49 U. S. C.) 18
Section 1 21
Section 1(3) 38, 48
Section 1(3) (b) 11, 22, 23, 25, 26, 28, 30, 48, 56
Section 1(4) 3, 5, 15, 99
Section 1(6) 38
Section 3 ..... 10, 11, 15, 17, 21, 34, 67, 71
Section 3(1) 3, 6, 14, 68, 69, 71, 72, 73, 74, 99
Section 3(4) 3, 6, 15, 73, 74, 99
Section 5(2) 11, 19

Section 13(1) 5
Section 15(1) 7, 19, 21, 74
Section 15(3) ..... Passim
Section 15(4) ..... Passim
Section 15(5) 19
Section 15(6) 19
Section 15(7) 19
Section 15(8) 19
Section 15(13) 19
Section 88 38

Mann-Elkins Act (36 Stat. 551) 18, 19

Transportation Act of 1920 (41 Stat. 484) 22

Transportation Act of 1940 (54 Stat. 899) 22

Title 28 U. S. C. Sections 1253 and 2101(b) 2

Title 28 U. S. C. Section 1336 9

Congressional Reports

S. Rep. 355, 61st Cong., 2d Sess., 45 Cong. Rec. 2819, March 7, 1910 19

H. Rep. 2832, 76th Cong., 3d Sess., 86 Cong. Rec. 10165, August 12, 1940 ..... 25, 26

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLANT.

OPINION BELOW.

The report of the Interstate Commerce Commission (R. 83-151) appears at 300 I. C. C. 453. The opinion of the District Court (R. 157-170) is reported at 182 F. Supp. 81.

JURISDICTION.

The final judgment of the District Court was entered March 25, 1960 (R. 170). Notice of appeal was filed by appellant in the District Court April 12, 1960 (R. 171-173). On motion of the Clerk of the District Court, an order was

entered on May 26, 1960, extending the time to docket the case and to file the record on appeal to August 10, 1960.

The jurisdiction of this Court to review the decision on direct appeal is conferred by Title 28 U. S. C. Sections 1253 and 2101(b). Probable jurisdiction was noted on October 17, 1960 and the case was consolidated with No. 307 for oral argument (R. 177).

QUESTIONS PRESENTED.

1. Whether the District Court erred in holding that the Interstate Commerce Commission correctly concluded that the Spokane, Portland and Seattle System,[1] hereinafter called S.P.& S. System, is operated in conjunction, and under common management and control, with the Great Northern Railway Company and the Northern Pacific Railway Company within the meaning of section 15(4) of the Interstate Commerce Act.

2. Whether, under section 15(4) of the Interstate Commerce Act, one railroad can be operated in conjunction, and under common management or control, with two independent, competing railroads, neither of which owns a controlling interest in the first or any interest whatever in the other.

3. Whether the District Court erred in holding that the Interstate Commerce Commission's finding that, with certain exceptions, through routes do not exist over the Milwaukee's[2] line via Spokane between points on the S.P.&S. System, on the one hand, and points throughout the United States, on the other hand, is supported by substantial evidence and should not be disturbed.

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1. The Spokane, Portland and Seattle System refers collectively to Spokane, Portland and Seattle Railway Company, Oregon Electric Railway Company, and Oregon Trunk Railway.

2. The Milwaukee refers to appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

4. Whether the District Court erred in holding that the Interstate Commerce Commission's finding that the failure and refusal of the S.P.&S. System to join in the establishment of through routes and joint rates with the Milwaukee and its connections via Spokane similar to those in effect between the S.P.&S. System and the Great Northern and Northern Pacific and their connections is not a violation of sections 1(4), 3(1) or 3(4) of the Interstate Commerce Act, is supported by substantial evidence and should not be disturbed.

5. Whether the District Court erred in holding that the finding by the Commission that it is not necessary or desirable in the public interest, in order to provide adequate and more efficient or more economic transportation, to require the establishment of through routes and joint rates between the S.P.&S. System and the Milwaukee via Spokane similar to those in effect via the S.P.&S. System and the Great Northern and the Northern Pacific and their connections is supported by substantial evidence and should not be disturbed.

STATUTES INVOLVED.

This appeal involves the following provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 et seq:

Section 1(3) (b), 49 U.S.C., Sec. 1(3) (b);
Section 1(4), 49 U.S.C., Sec. 1(4);
Section 3(1), 49 U.S.C., Sec. 3(1);
Section 3(4), 49 U.S.C., Sec. 3(4);
Section 13(1), 49 U.S.C., Sec. 13(1);
Section 15(1), 49 U.S.C., Sec. 15(1);
Section 15(3), 49 U.S.C., Sec. 15(3);
Section 15(4), 49 U.S.C., Sec. 15(4).

These statutes are set out in order in Appendix A at pages 105-110 hereof.

STATEMENT.

The Milwaukee is an interstate common carrier by railroad operating from Indiana and Chicago through the Twin Cities, Minneapolis and St. Paul, to Spokane and Seattle. (See map, App. B.) The lines of the Great Northern Railway Company and the Northern Pacific Railway Company, collectively called the Northern Lines, extend also from Minneapolis-St. Paul to Spokane and the Pacific Northwest. The S.P.&S. System operates approximately 950 miles of railroad in a generally westward direction from Spokane through the states of Washington and Oregon. (See map, App. C.) (R. 94-96).

Except for qualifying shares the Northern Lines each own equal shares of all the stock and bonds of the Spokane, Portland, and Seattle Railway Company, which, in turn, wholly owns the Oregon Electric Railway Company and Oregon Trunk Railway (R. 97).

At Spokane there are complete facilities for interchange of freight between the S.P.&S. System and the Milwaukee (R. 107). During 1952 these facilities were used to interchange 513 carloads of freight (R. 109). The S.P.&S. System also connects in the Spokane area with the Northern Lines (R. 94).

Through routes[3] and joint rates[4] for all commodities,

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3. A through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139.

4. The essential feature of a joint rate is that connecting railroads have agreed to carry traffic from points on one road to points on the other for an aggregate charge which is less than the sum of their local charges between the same points. Without such agreement or consent, neither road has authority to name or allow a lower through rate than a combination of their local rates. *New Haven Railroad* v. *Platt*, 7 I. C. C. 323, 333.

both eastbound and westbound, are maintained by the S.P.&S. System with each of the Northern Lines via Spokane. The S.P.&S. System has refused, however, to join with the Milwaukee in a full line of joint rates for commodities between S.P.&S. System points and points on the Milwaukee and its connections, via the Milwaukee's line between Spokane and Minneapolis-St. Paul (R. 143-151).

Traffic interchanged with the Milwaukee at Spokane to which joint rates do not apply must move at a combination of local rates which, because appreciably higher than the joint rates via the Northern Lines, penalize a shipper using the Milwaukee's route. As a result, the Milwaukee is deprived of the haul via its line between Spokane and Minneapolis-St. Paul on thousands of cars per year with a resulting annual revenue loss of over 2.5 million dollars (R. 88, 109).

The Milwaukee filed its amended complaint under Section 13(1)[5] of the Interstate Commerce Act with the Interstate Commerce Commission on August 27, 1954, charging the S.P.&S. System with violations of Sections 1(4),[6]

5. "* * * any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, * * * If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." 49 U. S. C. Section 13(1).

6. "It shall be the duty of every common carrier subject to this part * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * * It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; * * *" 49 U. S. C. Section 1(4).

3(1)[7] and 3(4)[8] of that Act by reason of its refusal to establish a complete line of joint rates on commodities interchanged with the Milwaukee at Spokane originating at or destined to points on the S.P.&S. System. The Commission was requested to determine and prescribe just, reasonable, non-preferential, non-prejudicial, and non-discriminatory joint rates for all commodities between points on the S.P.&S. System and points on the Milwaukee and its connections on a parity with those maintained via Spokane by the S.P.&S. System with the Northern Lines. In the event that through routes for such traffic do not already exist, the Milwaukee further requested that the Commission require the establishment thereof similar to the through routes maintained by the S.P.&S. System and the

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7. "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U. S. C. Section 3(1).

8. "All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, * * *" 49 U. S. C. Section 3(4).

Northern Lines (R. 13-42; 198-207). Such powers are vested in the Commission by Sections 15(1)[9] and 15(3).[10]

The S.P.&S. System admitted by answer that it had refused to enter into a full line of joint rates with the Milwaukee, but asserted that such joint rates would require the S.P.&S. System to embrace within the through routes, over which such rates would apply, substantially less than the length of its railroad and of the Northern Lines, contrary to section 15(4) of the Act (R. 212-216).

The Northern Lines each filed a petition for leave to intervene on behalf of defendant S.P.&S. System, and each alleged that it and the S.P.&S. System are connecting railroads operated in conjunction and under a common

9. "That whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, * * * and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." 49 U. S. C. Section 15(1).

10. "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part. * * *" 49 U. S. C. Section 15(3).

management or control lying between the termini of said through routes. The Milwaukee denied the affirmative allegations in the answer of the S.P.&S. System and in the petitions of the Northern Lines to intervene, and placed them upon proof with respect thereto (R. 191-192; 192-194; 219-221).

Petitions for leave to intervene on behalf of defendant S.P.&S. System also were filed by certain operating and non-operating labor organizations of the Northern Lines (R. 86).

Interveners in support of the Milwaukee were (R. 86):

Secretary of Agriculture of the United States.
Western Forest Industries Association.
National Livestock Producers Association.
Chicago Producers Commission Association.
American National Cattlemen's Association.
National Wool Growers Association.
Traffic Bureau of Sioux Falls, South Dakota.

After extended hearings and briefs, the Examiner proposed that the Commission find that: (1), the S.P.&S. System is jointly managed and controlled by the Northern Lines within the meaning of section 15(4), and, therefore, the establishment of through routes is prohibited unless they are found to be necessary or desirable in the public interest and are needed to provide adequate, and more efficient or more economic, transportation (R. 245); (2) with certain limited exceptions, no through routes exist on traffic interchanged between the S.P.&S. System and the Milwaukee at Spokane (R. 232); (3) existing combination rates on lumber and forest products, fresh fruits and vegetables, and livestock from points on the S.P.&S. System to destinations east of Spokane, and on furniture, agricultural implements, grain, iron and steel grain bins, and hogs, from points east of Spokane to destinations on the S.P.&S. System,

"are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Milwaukee routes and unduly preferential of shippers and receivers using the routes composed of the S.P.&S., and the northern lines, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the routes of the S.P.&S., and the northern lines, * * *" (R. 281).

and (4) it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes and joint rates thereover the same as apply via the S.P.&S. System and each of the Northern Lines and their connections, be established via Spokane between the S.P.&S. System and the Milwaukee and its connections on the commodities and between the areas named in (3) above (R. 281).

By report and order entered May 10, 1957, the Commission adopted the first two findings (R. 94, 107) proposed by the examiner and rejected the last two, substituting its findings that (1) the failure and refusal of the S.P.&S. System to join in the establishment of such through routes and joint rates do not result in discrimination against the Milwaukee nor in undue preference or prejudice between shippers or localities; and (2) the evidence does not show it necessary or desirable in the public interest, in order to provide adequate and more efficient or more economic transportation, to require the establishment of the through routes and joint rates (R. 141-142). The Commission dismissed the complaint and, by order dated October 24, 1957, denied a subsequent petition for reargument and reconsideration (R. 152-153).

On review pursuant to Title 28 U.S.C., Section 1336, the order of the Interstate Commerce Commission was affirmed by a three-judge District Court for the Eastern District of Wisconsin. 182 F. Supp. 81. The District Court discussed at some length the question of common manage-

ment and control, but simply held that the other findings of the Commission are supported by substantial evidence and should not be disturbed (R. 157-170).

SUMMARY OF ARGUMENT.

Absent a Section 3 violation, the Commission is prohibited by Section 15(4) from compelling the establishment of through routes which would short-haul a railroad, *i. e.* "require [it] without its consent to embrace in such routes substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed routes * * * unless the Commission finds that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic, transportation."

The Milwaukee and its supporting interveners herein seek relief from the refusal of the S.P.&S. System to join with the Milwaukee in a complete line of joint rates on all commodities interchanged with the Milwaukee at Spokane, the same as apply via the S.P.&S. System and the Great Northern Railway Company and Northern Pacific Railway Company, sometimes herein called the "Northern Lines". The interchange of traffic at Spokane with the Milwaukee guarantees the S.P.&S. System its long haul, because Spokane is its most easterly terminus.

The S.P.&S. System and the Northern Lines contend that the granting of such joint rates to the Milwaukee would short-haul the Northern Lines, both of which are claimed to be under common management or control with the S.P.&S. System.

Section 15(4), of course, is inapplicable herein if:

(1) The S.P.&S. System is not under common management or control with each of the Northern Lines; or

(2) Through routes already exist over which the Commission need only require the application of joint rates; or

(3) The refusal of the S.P.&S. System to join in joint rates results in a violation of Section 3.

If, contrary to the foregoing, Section 15(4) does apply, the evidence requires a finding with respect to certain commodities that through routes are necessary via the Milwaukee in order to provide adequate and more efficient or more economic transportation.

1. Common Management or Control.

The S.P.&S. System is not, and can not be, under common management or control with each of the Northern Lines, which have their own separate and independent managements and are strongly competitive with each other (R. 1985).. The language of Section 15(4) "describes aptly a single railroad system." *U. S. v. American Railway Express Co.* (1924), 265 U. S. 425, 431, 432. The protection of Section 15(4) was intended by Congress for a railroad with a line of its own lying between the termini of a proposed route. This intent is confirmed by the report of the Senate Committee recommending passage of the Act in which the term "under common management or control" was added to Section 15(4). Elsewhere in Section 15, Congress carefully used "carrier or carriers" or "line or lines" and in Section 5(2), "two or more carriers jointly" when it meant to include carriers jointly or generally.

To exclude joint control by two independent competing railroads is in accord with the provisions and purposes of Sections 1 and 3 of the Interstate Commerce Act, with which Section 15 is most closely related.

By the enactment in 1940 of Section 1(3)(b), Congress directed that the term "control" be given a broad meaning

in specific sections of the Interstate Commerce Act. From these sections, however, Congress deliberately omitted Section 15(4), thereby stressing that it did not want to broaden the interpretation of "control" as therein used. A joint Senate-House Conference Committee which ironed out the differences in the legislation as enacted, confirmed that Section 15(4) was omitted deliberately and that there was to be no change in the interpretation of "control" therein.

The District Court, under the mistaken theory that it had detected a uniformity in rate-making and through route cases prior to 1940, concluded that Congress would naturally assume that the Commission would hold, as it had in rate-making cases, that a railroad could be under common management or control under Section 15(4) with each of two independent competing railroads (R. 167).

An analysis of such cases reveals only a uniform rejection of the contention, whenever raised in a Section 15(4) case, that common management or control includes joint control by two or more owners. *Hughes Creek Coal Co. v. K. & M. Ry. Co.* (1914), 29 I. C. C. 671; *Absorption of Switching Charges* (1929), 157 I. C. C. 129; *Manufacturers Ry. Co. v. Ahnapee & W. Ry. Co.* (1931), 172 I. C. C. 554.

Voluminous evidence relating to control by the Northern Lines proved only that they can, when able to agree, jointly control the S.P.&S. System. The evidence also establishes, as noted by the District Court, that neither the Northern Pacific nor the Great Northern can individually control the S.P.&S. System (R. 162).

Moreover, by their own conduct before the North Pacific Coast Freight Bureau, a rate-making body, and in matters of tariff application, the Northern Lines and the S.P.&S. System have demonstrated that they do not regard the S.P.&S. System as under common management or control with the Northern Lines, except when necessary to justify discrimination against a connecting line.

2. Through Routes.

The Commission in its report acknowledged that:

> "Routes are available to and from points on the S.P.&S., via Spokane, in connection with the complainant [Milwaukee] and its eastern connections, but generally shippers would have to pay combination rates if such routes were used." (R. 88.)

It has been well settled since 1926 that through routes can exist, although commercially closed by high combination rates. *Virginian R. Co. v. United States* (1926), 272 U. S. 658.

At present, a full line of joint rates applies on all traffic to or from S.P.&S. System points via all Milwaukee lines east and south of the Twin Cities (Minneapolis-St. Paul). In additon, joint rates presently apply on S.P.&S. System traffic via the Milwaukee's line between Spokane and the Twin Cities on:

(1) Every commodity moving in import-export traffic through port cities served by the S.P.&S. System to and from points on the Milwaukee and its connections throughout the country east of the Missouri River and in Wyoming, Colorado, and New Mexico;

(2) Lumber and forest products from S.P.&S. System originis to all local points and some common points on the Milwaukee east of the Missouri River and west of Chicago;

(3) General and specific commodities between certain points on the S.P.&S. System and certain points on the Milwaukee in Montana and Idaho (R. 149-151).

Joint rates described in Paragraphs (1) and (2) apply via routes competitive with the Northern Lines. Further, the S.P.&S. System and the Great Northern join with the

Milwaukee, independently of the Northern Pacific, in joint rates between S.P.&S. System points and Milwaukee points via routes competitive with the Northern Pacific (R. 2877). Joint rates, as a matter of law, presuppose through routes. *United States* v. *Great Northern Railway Co.* (1952), 343 U. S. 562, 574.

Over 500 cars per year of various commodities are interchanged at Spokane by the S.P.&S. System and the Milwaukee (R. 109). Unlike *Denver & R. G. W. R. Co.* v. *Union P. R. Co.* (1956), 351 U. S. 321, in which the Union Pacific had jealously safeguarded its long haul and had not opened commercially the Rio Grande routes, the S.P.&S. System and the Northern Lines have not jealously guarded the long haul of each Northern Line.

Through routes, therefore, presently exist via the Milwaukee's line between Spokane and the Twin Cities, as well as over the Milwaukee's lines east of the Twin Cities, as above outlined, and the Commission need only order the application of the additional joint rates herein sought.

3. Section 3 Violations.

The Commission clearly indicated that it would be unable to find a violation of Section 3(1) if preferences or advantages or prejudices and disadvantages are extended to entities located on the lines of different carriers not acting in concert or collusion (R. 141). Inasmuch as the S.P.&S. System is in fact acting in concert and collusion with the Northern Lines in refusing additional joint rates to the Milwaukee (R. 215), and is responsible for the resulting preferences, advantages, prejudices, and disadvantages, it is clearly subject to the requirements of Section 3(1). *Texas & P. R. Co.* v. *United States* (1933), 289 U. S. 627, 648, 649.

The evidence of undue prejudice to (1) lumber mills on the Milwaukee who compete for the purchase of lumber at S.P.&S. System points, and (2) lumber wholesalers who are deprived of the opportunity to sell transit lumber shipments in the Milwaukee's territory between Spokane and the Twin Cities, is exceptionally strong.

Section 3 outlaws discrimination in all its forms. Hence the discrimination by the S.P.&S. System in favor of two independent, competing, connecting lines, with which it is not under common management or control, against a third connecting line is a violation of Section 3(4). *Dixie Carriers* v. *United States* (1956), 351 U. S. 56.

The long haul protection of Section 15(4) is without application to cases under Section 3 of the Act. *Great Northern Railway Company* v. *United States* (1959), 172 F. Supp. 705, 707, 708 (D. Minn.).

4. Requirements of Section 15(4) Satisfied.

Even if applicable, the requirements of Section 15(4) have been fully satisfied. The evidence conclusively shows, as found by the examiner, that through routes via the Milwaukee's line between Spokane and the Twin Cities are needed in order to provide adequate and more economic transportation eastbound for lumber and forest products, fresh fruits and vegetables, and livestock, and westbound for furniture, agricultural implements, grain,[11] iron and steel grain bins, and hogs (R. 281).

The refusal by the S.P.&S. System of additional joint rates via the Milwaukee's line between Spokane and the Twin Cities is in violation of Section 1(4) and results in

11. Although grain was not included in the commodities named in the examiner's proposed report (R. 281), it was therein inserted pursuant to notice to the parties by the Commission on August 2, 1956.

short-hauling of the Milwaukee on 11 of every 12 cars with a resulting loss to the Milwaukee of over 2.5 million dollars per year. The national interest, which requires the protection of railroads against short-hauling, is thus flaunted by the S.P.&S. System's discrimination against the Milwaukee in favor of the Northern Lines, an evil which Section 15(4) was not intended to promote.

ARGUMENT.

I.

THE S.P.&S. SYSTEM CANNOT, WITHIN THE MEANING OF SECTION 15(4) OF THE INTERSTATE COMMERCE ACT, BE OPERATED UNDER COMMON MANAGEMENT OR CONTROL WITH EACH OF TWO INDEPENDENT, COMPETING RAILROADS, NEITHER OF WHICH HAS A CONTROLLING INTEREST IN THE S.P.&S. SYSTEM OR ANY INTEREST IN THE OTHER.

The Commission's power to establish through routes is restricted by Section 15(4) which provides:

> "(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation * * *" 49 U. S. C. Section 15(4).

It will be noted that Section 15(4) has no application if: (1) the S.P.&S. System is not under common management or control with each of the Northern Lines; or (2) through routes already exist via which additional joint rates are sought; or (3) refusal by the S.P.&S. System to join in through routes is a violation of Section 3. Even if applica-

ble. Section 15(4) would not prohibit the establishment of through routes necessary to provide adequate and more efficient or more economic transportation.

It will be shown in Section I of this argument that the S.P.&S. System is not under common control with each of the Northern Lines within the meaning of the words "common management or control" intended by Congress in Section 15(4).

A. The Legislative History and Language of Section 15(4) Discloses That Congress Intended the Words "Common Management or Control" to Mean Control by One Railroad of Another, and Not Joint Control by Minority Interests.

Under the original Interstate Commerce Act, enacted in 1887 (24 Stat. 379), the Commission could not require through routes or joint rates. In 1906, however, the *Hepburn Act*, 34 Stat. 589, empowered the Commission to establish through routes provided no reasonable or satisfactory through routes already existed.

In 1910, the *Mann-Elkins Act*, 36 Stat. 551, enlarged the Commission's power to prescribe through routes. It eliminated the proviso that no reasonable or satisfactory through routes already exist, and substituted the forerunner of Section 15(4), using for the first time the words "under common management or control" in through route legislation:

> "* * * in establishing such through route the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless to do so would make such through route unreason-

ably long as compared with another practicable through route which could otherwise be established."

The foregoing language granting short haul protection to a railroad and any intermediate railroad operated in conjunction and under a common management or control therewith, is cast in the singular. As observed by this Court, it "describes aptly a single railroad system". *U. S. v. American Ry. Exp. Co.* (1924), 265 U. S. 425, 431, 432. It gives no indication that Congress intended that two independent, competing railroads could each be under common management or control with a railroad in which neither has a controlling interest. If Congress had intended to extend the protection of Section 15(4) to such railroads, it would have done so expressly. In other parts of Section 15, *i. e.* 15(1), (3), (5), (6), (7), (8) and (13), it carefully said "carrier or carriers" or "line or lines" when it meant to include carriers or lines jointly.

Moreover, when Congress intended to include joint control in legislation relating to control of a carrier, it took particular pains to say so. Section 5(2) provides:

> "(a) It shall be lawful, with the approval and authorization of the Commission * * * for any carrier, *or two or more carriers jointly*, to acquire control of another through ownership of its stock or otherwise * * *." (Emphasis supplied.)

The report of the Senate Committee on interstate commerce recommending passage of the *Mann-Elkins Act*, S. Rep. 355, 61st Cong. 2d Sess., 45 Cong. Rec. 2819, March 7, 1910, makes it clear that when Congress enacted Section 15(4), it had in mind not a railroad with two or more owners, each without individual control, but a railroad with complete or dominating control of another:

> "It would seem to be unreasonable to empower the commission to require a railroad company *having a line of its own* between two designated termini to

allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route in competition with it, thus depriving it of the natural advantage of possessing a direct line between the termini, unless such line should happen to be so much longer than the proposed new through route as to make the establishment of such new route not merely an added convenience, but a public necessity." (Emphasis supplied.)

As observed by the Supreme Court of West Virginia, the word "control" has no legal or technical meaning, and must be given such an interpretation as the legislature intended it to have, to be ascertained from the connection in which it is used, the Act in which it is found, and the legislation of which it forms a part. *Coal & Coke Ry. Co.* v. *Conley*, 67 S. E. 613, quoted in *Gulf Refining Co.* v. *Fox* (1935), 11 F. Supp. 425, 430 (S. D. W. Va).

The sections of the Interstate Commerce Act most closely related to Section 15 are Sections 1 and 3. The through route provisions of Section 15 must, therefore, be read in connection with the provisions and purposes of the latter two sections. *Lumber Rates from Oregon and Washington to Eastern Points* (1914), 29 I. C. C. 609, 618. The purpose of these sections and their interrelation with Section 15 after the 1910 amendment are discussed in *Flour City S.S. Co.* v. *L. V. R. R. Co.* (1912), 24 I. C. C. 179:

> "The duty under [Section 1] is two-fold; first, through routes must be established, and second, just and reasonable rates made applicable thereto * * * *The theory of this provision is that carriers should freely interchange freight between their respective lines to the end that interstate commerce may move without interruption or delay* * * * However, the provision in question should not be subjected to so narrow a construction, but should be read in connection with the latter portion of Section 3, with Section 15, and with a regard to the intendment of the act as a whole

and the correction of the evils it has sought to remedy. Section three requires every common carrier subject to the provisions of the act to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and forbids discrimination in the rates and charges between such connecting lines. *This provision broadens section one and makes plain the intent of the Congress that every reasonable and proper facility shall be extended equally by a carrier to all of its connections and that no discrimination in its charges shall be made in favor of or against any connecting line.* Section 15 then provides that this Commission may establish through routes and joint rates and prescribe the division of such rates and the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint rates, and it further provides that this shall apply when one of the carriers is a water line." 24 I. C. C. at 184, 185. (Emphasis supplied.)

Section 15(4) is an exception to the Commission's powers under Section 15(1) and 15(3) to enforce Sections 1 and 3 and to establish through routes, and must, therefore, be strictly construed.

"Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms. The petitioner must bring itself within this exception. *Schlemmer* v. *Buffalo, Rochester & P. R. R. Co.*, 205 U. S. 1, 27 S. Ct. 407, 51 L. Ed. 681; *Ross* v. *Dural*, 13 Pet. 45, 10 L. Ed. 51." *Rochester Telephone Corporation* v. *United States* (1938), 23 F. Supp. 634, 636 (W. D. N. Y.)

Since 1910, Section 15(4) has been amended only twice. The Transportation Act of 1920 (41 Stat. 484) made the short-haul restriction inapplicable when the Commission finds a violation of Section 3 and gave the Commission summary power to establish temporary through routes in time of emergency.

The Transportation Act of 1940 (54 Stat. 899) made inapplicable the short haul restriction when the Commission finds a through route is necessary to provide adequate and more efficient or more economic transportation. The Commission also was required, rather than merely authorized, to establish through routes meeting the requirements of Sections 15(3) and (4).

Although requests of the Commission to Congress for complete freedom to establish through routes have not been granted, *Thompson* v. *United States* (1952), 343 U. S. 549, 554-556, nevertheless every change in Section 15(4), since 1910, has removed restraints on the Commission's through route powers. A strict construction of "common management or control" in Section 15(4), would follow the trend of legislation over the past fifty years.

B. The Enactment in 1940 of Section 1(3)(b) and the Explanation by Congress Why It Did Not Broaden the Meaning of "Control" in Section 15(4) Confirm That "Common Management or Control" as Used Therein Must Be Narrowly Construed and Does Not Embrace Joint Control by Minority Interests.

Corroboration of the intent of Congress that the words "common management or control" in Section 15(4) be strictly construed, is found in the enactment of Section 1(3)(b) of the Interstate Commerce Act in 1940.

> "For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where

reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control." 54 Stat. 898, 49 U. S. C. Section 1(3)(b).

The intentional omission of mention of Section 15(4) is of utmost significance.

The history of Section 1(3)(b) begins with *Rochester Telephone Corporation* v. *United States* (1938), 23 F. Supp. 634 (W. D. N. Y.). Involved was the question whether the New York Telephone Company controlled the Rochester Telephone Corporation within the meaning of Section 2 of the Communications Act, 47 U. S. C. Section 52, which exempted from the jurisdiction of the Federal Communications Commission any carrier:

"* * * engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier."

Concurrence of 80 per cent of the common stock of the Rochester Corporation was necessary to approve any major matter, and it was contended that the New York company's ownership of only one-third of such stock was conclusive of its lack of control. The remaining two-thirds was paid for by the New York company and placed on deposit in a voting trust. No other securities of the Rochester Corporation had any voting rights. The Federal Communications Commission concluded:

"* * * the New York Company, through stock

> ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation'." *Rochester Tel. Corp.* v. *U. S.* (1939), 307 U. S. 125, 145.

Suit to set aside the decision of the Federal Communications Commission was brought in the District Court (W. D. N. Y.). In its search for the intent of Congress, the Court looked to the report of the committees of Congress explaining the legislation. From these reports, the Court concluded that Congress intended that "control" as used in the Communications Act must be broadly construed and "to include actual control as well as what has been called legally enforceable control."

The Court then upheld the Federal Communications Commission finding that the New York Telephone Company had actual control of the Rochester Telephone Corporation by virtue of:

(a) The New York Company's position as the dominant financial factor in the Rochester Corporation;

(b) Its ownership of 67% of all issued and outstanding capital stock of the Rochester;

(c) Its contractual arrangements with the Rochester; and,

(d) The plan of organization, incorporation, and election of officers; and a trust agreement arranged by the New York Company whereby it paid for and placed under a trust agreement all of the common stock which it did not own in its own name. 23 Fed. Supp. 634, 638.

On appeal, the Supreme Court in *Rochester Tel. Corp.* v. *U. S.* (1939), 307 U. S. 125, "emphasized the breadth of the

statutory language as embracing every type of control in fact" and affirmed the finding of the Commission and the District Court that the New York company had control of the Rochester Corporation. *United States* v. *Marshall Transport Co.* (1944), 322 U. S. 31, 38.

Congress decided it would be well to extend this broad definition of "control" to certain sections of the Interstate Commerce Act, and for that purpose enacted Section 1(3)(b). Contrary to the impression of the Court below (R. 164) the language was obviously intended to cover joint control in view of its application "to a relationship between any person *or persons* and another person *or persons*" [emphasis supplied].

Congress, however, deliberately excluded Section 15(4) from the sections in which the word "control" was henceforth to receive a liberal interpretation. In its joint report, the Senate-House Conference Committee explained:

> "This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of 'control' which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term 'person' is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.
>
> "The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1)(a) and section 15(4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of

Rochester Telephone Corporation v. *United States*, * * *" H. Rep. 2832, 76th Cong., 3d Sess., 86 Cong. Rec. 10165, August 12, 1940.

Congress, through the joint Senate-House Conference Committee, thereby declared that it wanted no change in the interpretation of Section 15(4).

It will be seen, *infra*, pages 34-37, that prior to the enactment of Section 1(3)(b), no railroad had been found under common management or control with another under Section 15(4) in the absence of legally enforceable control vested in one railroad by lease or stock ownership. Similarly, whenever the question was decided in a through route case whether a railroad was under common management or control with two or more other railroads, none of which had a controlling interest, the Commission rejected the contention of common management or control.

The first such case to arise after the 1910 enactment of short haul protection for railroads under common management or control, involved joint ownership and control by the Chesapeake and Ohio (C. & O.) and the Lake Shore & Michigan Southern (Lake Shore) of the Kanawha & Michigan (K. & M.). The owning railroads held an almost equal number of 80,536 shares of a total capitalization of the K. & M. of 90,000 shares, and together elected five of the nine directors of the K. & M. A shipper petitioned the Commission to establish through routes and joint rates between points on the K. & M. and points on the C. & O. The K. & M. asserted that the sought routes would short-haul it contrary to Section 15(4). The shipper contended that the joint ownership and control by the C. & O. was equivalent to separate control by the C. & O. and that the C. & O. and K. & M. were, in effect, one system. The Commission, however, refused to find them under common management or control, but treated the C. & O. and K. & M. as separate

units, entitled to protection of Section 15(4) against the other. *Hughes Creek Coal Co. v. K. & M. Ry. Co.* (1914), 29 I. C. C. 671.

The officials of the C.&O. and K.&M. claimed that the relationship between their railroads, based upon admitted stock ownership, played no part in the administration of their properties and that they had never received any instructions based upon the ownership relation. 29 I. C. C. at 680. This did not, however, negate the power of *joint* control by the C.&O. and the Lake Shore. Shortly before the Commission's decision, the United States District Court for the Southern District of Ohio, in *United States v. Lake Shore & M. S. Ry. Co.* (1912), 203 Fed. 295, an anti-trust case, discussed the joint control power of the C.&O. and Lake Shore over four Ohio railroads, including the K.&M:

> "Moreover, evidence was offered to show that the Ohio roads are controlled and operated independently of one another and of either the Lake Shore or the Chesapeake & Ohio or both; and similarly as respects the Sunday Creek Company, and all these roads either collectively or separately. It is true that the officers of the railroads and the railroad offices are distinct, and this is true of the Sunday Creek Company; also that the managerial officers of these subordinate companies have been instructed to exercise their own judgment respecting the interests they represent, and yet the natural and probable effect of all this needs but little consecutive thought. Such officials are at last dependent for their positions upon the will of the two trunk line companies controlling the stocks; and it is vain to say that such officers do not become sensitive to the interests and policies of the real masters of the situation." 203 Fed. at 310.

The Commission's decision that the C.&O. and the K.&M. were not under common management or control within the meaning of Section 15(4), following the Court's determina-

tion that the K.&M. was under the joint control of the C.&O. and the Lake Shore, presents a clear interpretation that Section 15(4) does not include joint control by two independent railroads.

In *Absorption of Switching Charges* (1929), 157 I. C. C. 129, it was claimed without success by the Louisville & Nashville (L.&N.), a one-fifteenth owner of the Terminal Railroad Association of St. Louis (Terminal) that any interference by the Commission with an attempt by the L.&N. to eliminate the Alton & Southern from participation in traffic in the East St. Louis Switching District in favor of the Terminal, would be a violation of Section 15(4). The L.&N.'s insistence that it was under common management or control with the Terminal was rejected in the following statement of the Commission:

> "The terminal is not operated in conjunction and under a common management or control with respondent, within the meaning of the provisions of section 15." 157 I.C.C. at 132.

Again, in *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.* (1931), 172 I. C. C. 554, 564, a claim of common management or control under 15(4) with the Terminal was made on behalf of all 15 owners when the complaining railroad demanded through routes linking its line and the lines of the co-owners in competition with existing routes via the Terminal. The Commission, referring to its decision in the 1929 case, found that the joint management and control by the co-owners did not constitute common management or control under Section 15(4).

Prior to the enactment of Section 1(3)(b), two Section 15(4) cases involving the S.P.&S. System and the Northern Lines were decided. In neither case, however, was there a determination that the S.P.&S. System was under common management or control with the Northern Lines.

In the first case, *West Coast Lumber Mfrs. Asso. v. S. P. & S. Ry. Co* (1917), 45 I. C. C. 230, the re-establishment of through routes and joint rates on lumber was sought from certain points on the S.P.&S. to destinations east of Denver and the Missouri River via the S.P.&S. to Portland and the Union Pacific beyond. It was argued that these through routes and joint rates had been cancelled to obtain for the S.P.&S. its long haul of approximately 500 miles to Spokane, from which point traffic could move via the Northern Pacific, Great Northern, or Milwaukee. 45 I. C. C. at 231, 233. No mention was made of any claim nor was there any finding by the Commission that the short haul protection of Section 15(4) with respect to S.P.&S. traffic extended beyond Spokane. It is reasonable to believe that if the S.P.&S. and the Northern Lines were under common management or control, they would have claimed, and the Commission would have found, that the route via Portland and the Union Pacific would cause a short haul not of 500 miles to Spokane but of over 1800 miles from Portland to the Twin Cities.

In the second case, *West Coast Lumbermen's Asso. v. C. M. & St. P. Ry. Co.* (1927), 129 I. C. C. 363, through routes and joint rates were sought on lumber from certain points on the Great Northern, S.P.&S., and the Milwaukee in Oregon and Washington via Canada to Montana, the Dakotas, and Minnesota. The defendant lines contended that the Commission was without jurisdiction to establish joint rates through Canada and that rates prescribed should be made applicable via Dakota junctions which would secure to the Northern Lines and the Milwaukee the long haul to which they asserted they were entitled. Whether the Northern Lines were under common management or control with the S.P.&S. System and thereby entitled to the long haul of S.P.&S. traffic east of Spokane was not decided, the Commission finding that it had no au-

thority to require the establishment of joint rates over Canadian routes.

Thus, in the four Section 15(4) cases prior to 1940 in which joint-owner railroads claimed to be under common management or control with the jointly owned railroad, the Commission found there was no common management or control within the meaning of Section 15(4) in three cases and abstained from ruling thereon in the fourth because of a jurisdictional question.

To summarize:

(1) Congress in 1940 enacted Section 1(3)(b), which broadened the meaning of "control" as used in various sections of the Interstate Commerce Act, from which Section 15(4) was purposely excluded.

(2) Concurrently, through the Senate-House Conference Committee, Congress voiced its approval of the current interpretation of Section 15(4).

(3) In every such interpretation the Commission had found common management or control only when asserted by a single railroad, and had thrice rejected the claim of common management or control by joint owners.

Congress, therefore, approved the current interpretation of "common management or control" under Section 15(4) as control by one railroad and not collective or joint control by two or more railroads, each without individual control.

C. The District Court's Conclusion That the S.P.&S. System Can Be and Is Under Common Management or Control With Each of the Northern Lines Within the Meaning of Section 15(4) Is Based Upon Patently Erroneous Premises.

The Court below in holding that each of the Northern Lines is under a common management or control with the S.P.&S. System and entitled to the short haul protection of Section 15(4), reasoned as follows:

(1) Control of traffic policy is decisive in questions of management or control in rate-making cases.

(2) Control of traffic policy is also decisive of common management or control in through route (Section 15(4)) cases.

(3) In rate-making cases, two competing railroads can jointly manage and control another railroad by controlling its traffic policy.

(4) Congress, aware that the Commission:

(a) in every situation met so far, including both rate-making and through route cases, has applied the traffic control test, and

(b) in rate-making cases has treated a railroad as under the management or control of each of two competing owners,

would reasonably expect the Commission to continue to follow the rate-making case patterns and treat a railroad as under common management or control with each of its two competing co-owners in through route cases. (R. 166, 167)

Implicit in this reasoning is a conclusion that Congress has given advance approval to an interpretation that Section 15(4) embraces joint control by independent compet-

ing railroads of another railroad. Such conclusion, however, is invalidated by the erroneous premises of the Court's argument.

1. The Commission in Rate-Making Cases Has Not Consistently Applied the Traffic Policy Control Test to Questions of Management or Control.

In rate-making cases, the Commission is not concerned with establishing through routes or with the meaning of "common management or control" intended by Congress in Section 15(4); yet both the Commission and the District Court have resurrected a rate-making case for a definition which the Commission discarded 27 years ago. In that case, *Blackshear Mfg. Co.* v. *A. C. L. R. R. Co.* (1924), 87 I. C. C. 654, the Commission permitted higher rates on fertilizer for joint line movements but not for carriers under the "same management and control." The Commission supplied not only a new phrase, but a definition as well:

> "It should be understood that where the term 'carriers under the same management and control' is used in this report, it refers to carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained." 87 I. C. C. at 664.

Prior to the *Blackshear* case the Commission had held that when practically all the stock of one carrier is owned by another, they should be treated for rate-making purposes as a single line. *Pacific Creamery Co.* v. *S. P. Co.* (1916), 42 I. C. C. 93; *Arizona Packing Co.* v. *A. E. R. R. Co.* (1923), 81 I. C. C. 115.

The Commission for approximately nine years (1924-1933) cited the *Blackshear* definition in rate-making cases, but often also relied upon stock control or management by

the same officials. *Livestock, To, From, and Between Points in the Southeast* (1924), 91 I. C. C. 292, 294; *Raleigh Freight Traffic Bureau* v. *A. C. L. R. R. Co.* (1926), 107 I. C. C. 156, 159; *Humbard Construction Co.* v. *Southern Ry. Co.* (1930), 161 I. C. C. 38, 40; *Rates on Chert, Clay, Sand, and Gravel* (1933), 197 I. C. C. 215, 242.

A year after the last cited case, the Commission, in holding two railroads under common control or management and requiring the application of single line rates, omitted reference to the *Blackshear* policy control test:

> "The principal issue here to be determined is whether or not the Blue Ridge is under the 'common control or management' of the Southern. The Blue Ridge * * * 'has always been controlled by the Southern Railway Company and all of its financial dealings during its entire life have been with that company.' It is testified in the instant case that there has been no change in the status of the Blue Ridge since the decision in the foregoing proceeding. The president, the comptroller, the treasurer, and several other officials are the same for both companies, and in the annual reports of the Blue Ridge it is shown that the Southern owns practically its entire capital stock. Under similar circumstances we have uniformly held that there exists a common control or management." *Birmingham Slag Co.* v. *Blue Ridge Ry. Co.* (1934), 201 I. C. C. 554, 555.

Lastly, in *Dublin & Laurens County C. of C.* v. *Macon, D. & S. R. Co.* (1939), 234 I. C. C. 415, it was contended that the Macon, Dublin & Savannah Railroad (Macon) was under common management or control with the Seaboard Air Line Ry. (Seaboard) and hence was not entitled to the higher rates allowed to financially weak lines. The Macon controlled its own traffic policy to the extent of competing against the Seaboard, but because of other facts, *e.g.*: that the Seaboard guaranteed the bonds of the Macon:

that the Macon was staffed with experienced officers of the Seaboard; and that the Seaboard had, or was in a position to acquire for a nominal sum, the right to vote the controlling stock of the Macon, the Commission found that the Macon and the Seaboard were under common management or control. The dissenting opinion pointed out that under the traffic policy control test, the Macon should be found a separate line and not subject to the common control and management of the Seaboard, thus confirming that *Blackshear* had been laid to rest.

Hence the first premise of the lower Court—that in rate-making cases, the Commission has always applied the test of traffic policy control to determine whether railroads are under the same management or control—is invalid.

2. In Section 15(4) Cases, Railroads Have Been Held Under Common Management or Control Only When One Railroad Has Stock Control of Another.

The District Court cites two cases in which the Commission has allegedly applied the *Blackshear* test, *i. e.* control of traffic policy, to questions of common management or control under Section 15(4). In the first case, *Alabama T. & N. R. Corp.* v. *Southern Ry. Co.* (1928), 148 I. C. C. 708, the Commission mentioned, among other things, the *Blackshear* definition but made no finding under Section 15(4) of common management or control. Such a finding was obviated by the defendant railroads' participation in through routes and joint rates with other railroads while refusing similar routes and rates to the complainant railroad. The Commission found such discrimination to be a violation of Section 3 of the Interstate Commerce Act, and hence Section 15(4) could afford no protection. Cf. *Great Northern Railway Company* v. *United*

States (1959), 172 F. Supp. 705, 707; 708. Moreover, it had previously been determined that the defendant railroads were under the majority stock control of the same railroad, the Southern Railway, and that most of the executives, general, operating, and traffic officers of the defendant railroads were also officers of the Southern. *U. S. War Department* v. *A. & S. Ry. Co.* (1923), 83 I. C. C. 742.

In the second case, *Georgia & F. R.* v. *Atlantic Coast Line R. Co.* (1933), 191 I. C. C. 489, the Commission made it clear that mere traffic policy control is not equivalent to common management or control under Section 15(4). It noted at page 496 that in the earlier case of *Restriction in Routing Between Greenwood and Augusta* (1930), 165 I. C. C. 3, it had made no finding as to the control of the Charleston & Western Carolina (Charleston) and the Georgia Railroad (Georgia) despite a finding at page 12:

> "their traffic policies are under the actual management and control of the Coast Line irrespective of whether the traffic, or any of it, is moved over the Coast Line as a separately operated carrier. The control is actual to the extent of controlling traffic policy. *Blackshear Mfg. Co.* v. *A. C. L. R. R. Co.*, 87 I. C. C. 654, 664."

Instead of accepting this as conclusive of common management or control under Section 15(4) the Commission pointed out that the United States Supreme Court in *Atlantic Coast Line R. Co.* v. *United States* (1932), 284 U. S. 288, had described the Charleston as controlled by the Coast Line through stock ownership. 191 I. C. C. at 496. The Georgia, which like the Charleston was found to be under common management or control with the Coast Line, was leased jointly by the Coast Line and the Louisville and Nashville (L&N.). Control of the L&N., and hence of the Georgia, was vested in the Coast Line by reason of its ownership of 51 per cent of the stock issued and out-

standing of the L.&N. whereby the Coast Line elected the L.&N.'s Board of Directors which in turn elected the president and other officers. *Restriction in Routing Between Greenwood and Augusta, supra*, 165 I. C. C. 3, 10.

Thus, in each Section 15(4) case in which the Commission referred to the *Blackshear* definition, ultimate control was vested in one railroad by ownership of stock.

In all other cases seeking the establishment of through routes, the Commission has likewise found railroads to be under common management or control only when one railroad owned all or substantially all of the stock of another without regard to control of traffic policy.

United States v. *U. P. R. R. Co.* (1913), 28 I. C. C. 518.

West Coast Lumber Mfrs. Asso. v. *T. E. R. R. Co.* (1917), 45 I. C. C. 227.

Lemon Cove-Woodlake Asso. v. *A., T. & S. F. Ry. Co.* (1928), 139 I. C. C. 239.

Port of New York Authority v. *A., T. & S. F. Ry. Co.* (1928), 144 I. C. C. 514.

Western Pac. R. Co. v. *Northwestern Pac. R. Co.* (1933), 191 I .C. C. 127.

The Court below regards *Seaboard Airline Railway Recs.* v. *Carolina & N. W. Ry. Co.* (1934), 204 I. C. C. 416, as important for its recognition that the retention of the long haul by railroads under common management or control as defined in the *Blackshear* case is not a violation of Section 3(4). In the cited case, however, there was no reliance merely upon control of traffic policy to support a finding of common management or control. The Commission also pointed to the ownership and control by the Southern Railway of all of the preferred stock and 99 per cent of the common stock of the Carolina & Northwestern and the shar-

ing by the two railroads of various officers. 204 I. C. C. at 420.

The last mentioned case arose from the cancellation of joint rates via certain routes with the resulting application of combination rates higher than in effect via the route of two railroads under common management or control. The Commission, prior to 1940, regarded the short-haul protection of Section 15(4) as restricting not only its power to establish new through routes but also its power to require the continuation of through routes already in effect. In 1940, Congress made inapplicable Section 15(4) to cases involving the cancellation of joint rates or existing through routes (54 Stat. 911; 49 U. S. C. Section 15(3)). Prior thereto, however, the question of common management or control would arise from attempts of railroads to withdraw from through routes. In each such case in which railroads were found to be under a common management or control, one owned the majority of the stock of the other. *Lumber Rates from North Pacific Coast Points* (1914), 30 I. C. C. 111; *The Ogden Gateway Case* (1915), 35 I. C. C. 131; *Routing from Points on S. C. D. & P. Ry.* (1928), 142 I. C. C. 230.

3. The Commission's Decisions in Rate Cases Involving Joint Control Have No Precedential Value in Section 15(4) Cases.

The Court below, 182 F. Supp. at page 87 (R. 165), stated that in another line of decisions the Commission has held that for rate making purposes one railroad can be jointly managed and controlled by two other independent railroads. The cases cited by the Court, however, especially when considered in the light of other decisions, afford no precedent whatever for a finding that a railroad could be under common management or control within the meaning of Section 15(4) with each of its joint owners.

Thus, in *Russ Market Co.* v. *Northwestern Pac. R. Co.* (1930), 171 I. C. C. 117, the Northwestern Pacific and the Southern Pacific were treated as a single line for the purpose of applying a single line scale of rates applicable to trunk lines and their subsidiaries. The Commission observed that in an earlier case, *Eriksen* v. *A. A. R. R. Co.* (1925), 102 I. C. C. 374, it had held that the Northwestern Pacific must be considered as a branch of its two proprietary companies, the Southern Pacific and the Santa Fe. This citation was unnecessary. The Commission apparently overlooked the acquisition in late 1928 by the Southern Pacific of sole control of the Northwestern Pacific (*Control of Northwestern P. R. Co.* (1928), 150 I. C. C. 119), a fact which it later recalled in a Section 15(4) case, *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.* (1933), 191 I. C. C. 127.

In *Pacific Lumber Co.* v. *Northwestern Pac. R. Co.* (1918), 51 I. C. C. 738, followed by the *Eriksen* case, *supra*, the Southern Pacific and the Santa Fe, which then jointly owned the Northwestern Pacific, joined in rates from points on other subsidiary and independent lines lower than from points on the Northwestern Pacific. The Commission refused to permit such discrimination against the latter's shippers, which discrimination existed independently of the status of the Northwestern Pacific as an affiliated or independent railroad.

Among the rate-making cases involving joint control, the lower Court, 182 F. Supp. at page 87, cites *Des Moines Union Railway Switching* (1939), 231 I. C. C. 631 (R. 165, 166). The interjection of terminal switching cases serves only to cloud the issues. It is elementary that common carriers are bound to receive goods for transportation, carry them to their agreed destination, and there make delivery.[12]

12. For statutory provisions, see Sections 1(3) and 1(6) Interstate Commerce Act, 49 U. S. C. Sections 1(3) and 1(6); Section 8 Bill of Lading Act, 49 U. S. C. Section 88.

The switching of cars necessary to the receipt and delivery of the goods may be performed by the line haul carrier itself or, as in *Des Moines Union Railway Switching, supra*, through the agency of a terminal switching company, whose relation to its co-owners was described at 231 I. C. C. 636, as follows:

> "The facilities and equipment of respondent are held in trust for the joint and exclusive use and benefit of the proprietary companies as the equitable owners of the properties. They are maintained and used as required by the proprietary companies. All moneys received by the respondent, other than from the proprietary companies, belong to the proprietary companies. Except in certain contingencies all persons employed and paid either temporarily or permanently in the maintenance or operation of the terminal facilities are the joint employees and servants of the proprietary companies. Respondent's annual reports to us indicate that it is conducted as a joint facility, all of its operating expenses being offset by joint-facility credits.
>
> Neither of the proprietary companies does any switching within the Des Moines switching district, all such work being performed for them by respondent. They have no freight houses or team-track facilities in Des Moines other than those owned by respondent. The industries located on the lines of respondent are referred to in the terminal tariffs of the proprietary companies as being industries located on the proprietary lines."

In performing such service, a terminal switching company is not a common carrier performing service for the public under a tariff rate, but is merely acting as an agent for its owners under an agency agreement. *Chicago M. & St. P. Ry.* v. *Minn. Civic Assn.* (1918), 247 U. S. 490, 492-498; *Des Moines Union Ry. Switching, supra*, 231 I. C. C. 631, 636, 637; *Terminal Allowance to Minnesota Transfer*

(1946), 268 I. C. C. 5, 10, 11; *Houston Belt & Term. Ry. Co. Control* (1950), 275 I. C. C. 289, 303, 304.

That an agent is treated for rate-making purposes as a part of the line for which service is performed is of no significance in a Section 15(4) case. Railroads performing terminal switching on barge traffic have also been held to be agents of their competitors, the barge lines, in switching rate cases, but it is hard to imagine a more clear-cut absence of common management or control contemplated by Section 15(4). *Sioux City and N. O. Barge Lines, Inc.* v. *Chicago & North Western Ry. Co.* (1958), 303 I. C. C. 537, 546, 561.

Other terminal switching cases upon which the defendants have placed heavy reliance are *Louisville & Nash. R. R.* v. *United States* (1916), 242 U. S. 60, and *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.* (1918), 247 U. S. 490.[13] In addition to the fundamental distinction between a terminal switching company, acting as an agent for common carriers, and the S.P.&S. System which consists of common carriers each subject to all of the provisions of the Interstate Commerce Act involved herein, other factors distinguish those cases from the present proceeding.

In the *L. & N.* case the control of the switching agencies was ultimately vested in only one railroad, the L. & N. One agency, Nashville Terminal Company, which owned a portion of the terminal facilities at Nashville, was controlled by the L. & N. through 100 per cent stock ownership. The other agency, Nashville Terminals Association, which performed the terminal switching at Nashville, was not a legal entity, but merely an unincorporated association of

13. The Commission in its report also relied heavily upon the *L. & N.* case (R. 106, 107), but the District Court declined to find the *L. & N.* decision controlling on the question of discrimination in the present case (R. 169, 170). Neither the District Court's opinion nor the Commission's report mentioned the *Minn. Civic Assn.* case.

the L. & N. and the Nashville, Chattanooga & St. Louis Railway. The L. & N. held 71 per cent of the capital stock of the latter and thereby had ultimate control of the Nashville Terminals Association.

It is emphasized by the Commission (106-107) that in the *L. & N.* case the owning lines, L. & N. and N., C. & St. L. Ry., were competitors. It scarcely need be argued that since the L. & N. owned the majority (72%) of the stock of the N., C. & St. L. Ry., any competition between them was subject to the whim and control of the L. & N. The majority opinion of the Court recognized the closeness of the question posed in the *L. & N.* case, attested to by four dissents, when it said:

> "It is objected that upon this view a way is opened to get beyond the reach of the statute and the Commission. But the very meaning of a line in the law is that right and wrong touch each other and that anyone may get as close to the line as he can if he keeps on the right side." (*ibid* p. 74.)

Congress registered its disapproval of the Court's decision by repealing the provision of Section 3 of the Interstate Commerce Act (upon which the Court relied) that the Act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business" (91 Stat. 479).

For the *L. & N.* case to be comparable, the facts of the present proceeding would require drastic change: Instead of the complete independence which each Northern Line enjoys of the other, one would control the other through ownership of a majority of its stock and thereby control the entire Great Northern, Northern Pacific and S.P.&S. System operations. Title to parts of the S.P.&S. System properties would be held severally by each Northern Line and the remainder by a separate corporation. The latter corporation, in turn, would be entirely owned by the domi-

nant Northern Line. The operations now separately performed by the S.P.&S. System would instead be performed by the Northern Lines themselves, under a common name applied to their joint venture. Under the latter circumstance, there could arise no question of common management or control of a nonexistent intermediate carrier. It is clear that the *L. & N.* case, of doubtful authority today under the same factual situation, is no authority whatever for a holding that joint control, as claimed by the Northern Lines, is what Congress intended in Section 15(4).

In the *Minn. Civic Assn.* case the Minneapolis Eastern switched cars at Minneapolis as an agency for its owners, the Milwaukee and the Chicago, St. Paul, Minneapolis and Omaha Railway. Both the United States and Minnesota Supreme Courts deemed it significant that the two co-owners had by contract stripped the Board of Directors of "the Minneapolis Eastern Railway of the normal legal control of the company's affairs in several most important respects." *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.*, 247 U. S. 490, 496; *Minneapolis Civic & C. Assn.* v. *Chicago, M. & St. P. Ry. Co.* (1916), 158 N. W. 817, 818, 820.

Roth Blum Packing Co. v. *Southern Pac. Co.* (1934), 204 I. C. C. 93, is the last in the group of joint control cases cited by the Court below (R. 166). The Commission therein said:

> "Although the Oregon, California & Eastern operates independently as a legal entity, it is clear from the record that it is subject to a substantial degree of control by the Southern Pacific. For the purposes of this case the haul from points on its line to San Francisco in connection with the Southern Pacific will be treated as a single-line movement."

The extent of the Southern Pacific's control was not defined, and the holding that a particular haul via the Oregon and the Southern Pacific would be treated as a single line

movement was carefully confined by the Commission to that particular case.

Whatever scant encouragement this may afford appellees is neutralized by *Justice Co.* v. *Holton I-U Ry. Co.* (1929), 153 I. C. C. 673. In that case, there was joint stock control of the San Diego & Arizona by the Southern Pacific and an estate, which owned in equal shares the entire capital stock of the San Diego. Each of the two owners, as in the present proceeding, elected two members on the board of directors of the San Diego, with whom served a fifth neutral member. The Southern Pacific in the *Justice* case disclaimed control of the traffic policy of the San Diego but there could be no doubt that the two co-owners through the San Diego's board of directors had joint control over any phase of the operation. Notwithstanding, the Commission found that the two railroads should not be treated as a single line for rate-making purposes.

The Commission itself has dealt the final blow to the theory of the District Court that rate-making cases and through route cases follow a uniform pattern. The Commission has held that certain carriers which it had treated as a single line for rate-making purposes are not under common management or control within the meaning of Section 15(4). In 1930, the Commission, considering the relation between the Terminal Railroad Association of St. Louis (Terminal) and one of its 15 owners, the Chicago & Alton, said:

> "The Chicago & Alton does not reach St. Louis, but it is one of the proprietary lines of the Terminal, and for rate-making purposes that carrier and the Terminal are treated as one line." *Independent Paper Stock Co.* v. *Chicago & A. R. Co.* (1930), 168 I. C. C. 404, 405.

As heretofore mentioned, in *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.* (1931), 172 I. C. C. 554, the Com-

mission one year later rejected a contention by the proprietary lines including The Chicago & Alton of common management or control of the Terminal entitling them to the short haul protection of Section 15(4). The Commission could have made it no plainer that the requirements of Section 15(4) with respect to common management or control are completely unrelated to whether a railroad is part of another for rate-making purposes.

The Court below, as did the Commission, made a passing reference to seven cases in which the Commission supposedly held that for rate-making purposes the S.P.&S. System must be regarded as part of the Northern Lines rather than as an independent line (R. 102, 166). This superficial treatment reflects a recognition that railroads treated as single lines for rate-making purposes are not *ipso facto* under common management or control under Section 15(4). Even for rate-making purposes, these cases afford weak support for treating the S.P.&S. System and the Northern Lines as a single line.

In the first case, *Portland Chamber of Commerce* v. *O. R. R. & N. Co.* (1910), 19 I. C. C. 265, 283, the Commission concluded that the S.P.&S. "so far as these proceedings are concerned" must properly be considered a part of the Northern Lines rather than as an independent line, stating:

> "It is used by the Great Northern and Northern Pacific in the transportation of all business between Coast and Interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific."

In the quoted statement the Commission appears to have regarded the S.P.&S. as simply a joint facility over which the Northern Lines actually operated. The Commission, however, gave a more accurate picture in *Spokane, P. & S. Ry. Co.* (1932), 41 I. C. C. Val. Rep. 1, 21, 37, wherein it stated that the S.P.&S. owns and operates 493.95 miles of

road in Washington and Oregon; that the road is operated by the S.P.&S.; and that the property of the S.P.&S. had been operated by its own organization during its entire life.

The purpose for which the S.P.&S. was considered as a part of the Northern Lines is not clear. There was no discussion of whether single or joint line rates should apply over the S.P.&S. System and the Northern Lines, or whether the rates of the S.P.&S. System were in any way affected by its relationship to the Northern Lines.

The Commission, however, referred to the profitable operations of the S.P.&S. and thereafter expressed concern that the proposed rate reduction might entail a material loss in railroad revenue. It appears logical, therefore, that the Commission regarded the S.P.&S. as a part of the Northern Lines merely to credit its income proportionately to the Northern Lines without regard to whether either was under common management or control with the S.P.&S.

City of Astoria v. *S. P. & S. Ry. Co.* (1916), 38 I. C. C. 16, 23, included a reference to the ownership by the Northern Lines of the S.P.&S., but again there was no question of joint line versus single line rates, and no finding that the S.P.&S. for rate-making purposes should be considered as a single line with each of its co-owners.

Inland Empire Shippers League v. *Director General* (1920), 59 I. C. C. 321, again presented no problem of single line and joint line rates. The lower rates prescribed in that case, so far as the opinion discloses, applied via single and joint line routes, and it was apparently unnecessary to decide whether the S.P.&S. and its owners should be treated as a single line for rate-making purposes.

In *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern Ry. Co.* (1934), 198 I. C. C. 642, the complaint sought transit privileges on grain moving from Idaho, Montana, Oregon,

and Washington to California, when milled at Astoria, Oregon, which is served solely by the S.P.&S. System. It was held that the refusal to permit transit at Astoria involving a back haul of 100 miles was not unlawful. Again there was no indication that the decision turned on the relationship between the S.P.&S. System and the Northern Lines, and the reference by the Commission to its remark in *Portland Chamber of Commerce* v. *O. R. R. & N. Co., supra*, 19 I. C. C. 265, that the S.P.&S. should be regarded as a part of the Northern Lines, appears entirely gratuitous.

The Commission in *Spokane, P. & S. Ry. Co.* (1932), 41 I. C. C. Val. Rep. 1, was not conducting a rate-making case but was fixing the valuation of the S.P.&S. System. In doing so, the Commission required that the cost of moving S.P.&S. materials over the Northern Lines be computed at company-haul rates rather than at commercial rates, again referring to its remark in *Portland Chamber of Commerce* v. *O. R. R. & N. Co., supra*, 19 I. C. C. 265, 283, that the S.P.&S. must properly be considered as part of the Northern Lines rather than as an independent line.

Contrariwise, an attempt of the Northern Lines in another case to include their share of the cost of construction of the S.P.&S. System in the cost of their respective properties was rejected. The Commission in *City of Spokane, Wash.* v. *N. P. Ry. Co.* (1910), 19 I. C. C. 162, 171, insisted that the S.P.&S. should be treated independently of its owners and that patrons of the Northern Lines should not be taxed for the cost of the S.P.&S. construction. In this case, the S.P.&S. was definitely not treated as a single line with its co-owners.

Another case also demonstrates that the S.P.&S. System is not just a part of either of its owning lines. The Oregon Trunk Railroad, part of the S.P.&S. System, obtained a

certificate of public convenience and necessity for the extension of its line to Klamath Falls, Oregon, a distance of 178 miles. *Construction of Railroad Lines in Eastern Oregon* (1926), 111 I. C. C. 3. The Great Northern petitioned to intervene seeking (1) an amendment of the certificate substituting itself for the Oregon Trunk; and (2) a certificate of public convenience and necessity permitting the Great Northern to operate over the S.P.&S. from Spokane to Portland. The Commission denied the Great Northern's first request on the grounds that the Oregon Trunk had not consented to the substitution, without prejudice to the right of the Great Northern to submit an independent application for a certificate of public convenience and necessity to construct and operate the line to Klamath Falls if it could effect arrangements with the Oregon Trunk or with the Northern Pacific. *Construction of Railroad Lines in Eastern Oregon* (1927), 124 I. C. C. 529. The S.P.&S. System, therefore, is not merely a part of each co-owner; otherwise, neither the consent of the Oregon Trunk to the Great Northern's expansion plans nor authority of the Commission for a Great Northern operation over the S.P.&S. would have been necessary.

The two remaining S.P.&S. System cases, cited by the Court below are through-route, rather than rate-making cases, and discussion thereof will be found at pages 29, 55, 56.

4. The District Court's Reliance Upon a Non-Existent Pattern in Rate-Making and Through Route Cases Led It to an Erroneous Concept of Congressional Intent.

The Court below mistakenly thought: (1) that it had found a uniform pattern in rate-making and through route cases—that traffic policy control is equivalent to management and control, and (2) that since the Commission had found in rate-making cases that two railroads can jointly

manage and control a third railroad through control of its traffic policy, it would naturally apply the same principles in Section 15(4) cases. The Court then assumed that Congress was aware of this non-existent pattern and had, therefore, deemed it unnecessary to broaden the meaning of "control" in Section 15(4) as it did in other sections of the Interstate Commerce Act when it enacted Section 1(3) (b), *supra*, pages 22, 23. This reasoning led the Court to conclude that Congress intended to include joint control under Section 15(4).

As demonstrated, the conclusion of the lower court concerning the intent of Congress rests upon erroneous premises and is contrary to the correct interpretation of Section 15(4).

5. An Interpretation of "Common Management or Control" to Exclude Joint Management or Control Would Not, as Feared by the Court, Disturb the Over-All Plan of Railroad Regulation or Deprive Railroads of the Economies of Joint Operation.

The District Court below would bolster the conclusion of the Commission that the S.P.&S. System is under common management or control with each of the Northern Lines by pointing to supposed inequities which would result if joint management or control were held not to satisfy the requirements of Section 15(4). It states that "since joint management and control is recognized in rate cases, subsidiaries involved in such a situation would not be allowed weak line arbitraries, *i.e.* differentially higher rates allowed to short or weak line railroads" (R. 167). The only authority cited for such statement is a quotation from *Rate Structure Investigation, Part 13, Salt* (1933), 197 I. C. C. 115, in which the Commission stated that it had been the almost uniform practice to give certain lines in the South other than those under common management or control with some standard carrier, arbitraries in addition to the

scales prescribed for general application. The Court, however, was obviously unaware that in deserving cases, arbitraries have been accorded not only to a short line jointly owned by two standard carriers, but to lines under the management and control of a single railroad and even to branch lines of standard carriers.

In *Malleable Iron Range Co.* v. *Chicago, M. St. P. & P. R. Co.* (1942), 253 I. C. C. 431, the Commission approved an arbitrary for a haul over the line of the Camas Prairie Railroad from Spalding, Idaho to Grangeville, Idaho. The Camas Prairie, which the Commission noted is a short line owned jointly by the Northern Pacific and the Union Pacific was held entitled to such arbitrary because of the severe operating conditions and high maintenance costs encountered. Moreover, the defendants offered evidence of arbitraries on all classes of freight on branch lines in Washington of the Northern Pacific, Pacific Coast Railway, and the S.P.&S., all of which arbitraries were higher, distances considered, than the one applicable over the Camas Prairie. 253 I. C. C. at 432.

Arbitraries were granted to the Pacific & Idaho Northern, in addition to distance scale rates, from origins on that railroad to various western states. *Coast Packing Co.* v. *Gilmore & T. R. Co.* (1936), 218 I. C. C. 507. The Commission approved the acquisition of the Pacific & Idaho Northern by the Oregon Short Line, a part of the Union Pacific System, and the lease by the Union Pacific of the properties of the Pacific & Idaho Northern. *Oregon Short Line R. Co. Acquisition* (1936), 217 I. C. C. 135. Thereafter, the Commission, noting the high cost of operation of the Pacific & Idaho Northern, decreasing traffic, and necessary replacement costs held that proposed schedules which retained the arbitraries had been justified. *Livestock from Idaho to Interstate Destinations* (1938), 226 I. C. C. 225.

Clearly the Commission itself has found no difficulty approving arbitraries in proper cases for a short or weak line under common management or control with, or even for branch lines of, a standard carrier or carriers.

The District Court is also concerned because lines under common management or control are prevented from charging higher joint line scales (R. 468).

> "The addition for a two-line haul is somewhat akin to that for a terminal service. A mileage scale ordinarily yields a much higher rate in proportion for a short haul than for the long one; and when, therefore, two short hauls are combined, it is usually unjust to require the two carriers to accept compensation at the rate per mile applied for the entire long haul. To a degree they are entitled to a higher rate, in consideration of the fact that their individual hauls are short. Now, as distance increases the force of this consideration decreases. When distances of over 500 miles are involved, the fact that the service is by two lines is largely negligible * * * Our conclusion therefore is that no addition on account of the two-line haul should be made where the distance exceeds 500 miles." *Investigation of Alleged Unreasonable Rates on Meats* (1912), 23 I. C. C. 656, 661.

A one-line haul involves two distinct terminal services whereas a two-line haul involves also a switching movement from one line to the other. *Sheridan Chamber of Commerce* v. *C. B. & Q. R. R. Co.* (1913), 26 I. C. C. 638, 649. The expense for the additional terminal switching service, when incurred in connection with a line haul of 500 miles or more, as noted, is relatively insignificant. The through routes involved in the instant proceeding, with relatively few exceptions, would extend for distances well over 500 miles. With respect to the shorter routes, over which different rate scales may apply for single and joint line hauls, the Milwaukee and S.P.&S. System could be properly compensated by applying the joint line rate scales.

D. The Undisputed Evidence Proves That Neither the Great Northern Nor the Northern Pacific Is Under Common Management or Control With the S.P.&S. System.

Voluminous evidence was introduced by the Northern Lines to prove an undisputed fact—their joint ownership and power of control of the S.P.&S. System. The same evidence, however, proves what the Court below concedes—that "neither the Northern Pacific nor the Great Northern can individually control the S.P.&S." (R. 162).

The Commission found that the stocks and bonds of the S.P.&S. are owned in equal shares by the Northern Lines, and that the S.P.&S. solely owns, except for qualifying shares, the Oregon Electric and the Oregon Trunk, which together with the S.P.&S. constitute the S.P.&S. System. The Commission referred to the cash investment by the Northern Lines in the S.P.&S. totaling $76,403,278, their cancellation of accrued unpaid S.P.&S. bond interest, loans and advances made by the Northern Lines, and the nonpayment of dividends on S.P.&S. stock. The Commission concluded that it had cost the Northern Lines approximately $218,000,000 to keep the S.P.&S. in operation since 1910 (R. 98).

Lest this be considered in some way a justification for discrimination against the Milwaukee, it should also be remembered that loans and advances to the S.P.&S. System have been paid in full. From their investments, totaling $76,403,278, the Northern Lines have collected interest of $48,027,161, leaving a net cash outlay of $28,396,117. They now jointly own a railroad system with an investment in road and equipment alone of $139,170,506 (R. 97). To this generous return may be added $21,959,415 per year freight revenues from S.P.&S. traffic handled by the Northern Lines (R. 121).

The S.P.&S. System's board of directors consists of two representatives of each of the Northern Lines and one neutral member. The board elects officers and, upon direction of the Northern Lines, adopts resolutions to support corporate action. The presidency and one vice presidency of the S.P.&S. System are alternated each year between the presidents of the Northern Lines. There is no difference, however, in the authority exercised by each except in the title used in signing documents. The top operating official of the S.P.&S. System is also a vice president, but he does not act on any matter of importance without authority or approval of the presidents of the Northern Lines (R. 99, 100). The only officers who are not exclusive S.P.&S. officers are the two Northern Lines presidents (R. 2039).

The executive committee of the S.P.&S. System consists of the two presidents of the Northern Lines with two Northern Lines vice presidents as alternate members. The executive committee ratifies all documents executed by the officers of the S.P.&S. System (R. 99). Thus the Northern Lines, by an exact counterbalancing of power, have carefully and effectively insured that the other cannot control the S.P.&S. System.

The impotency of either Northern Line individually to control the S.P.&S. System is highlighted by the testimony of a former Great Northern president:

> "Q. Neither one of the two stockholders in the face of opposition of the other can do anything with the S.P.&S., can it?
>
> A. That is right. * * *
>
> Q. While that is one instance of where the two Northern Lines did not see eye to eye as to the utilization or the operations of the S.P.&S., it was the unfailing practice, was it not, for an executive of one line before he issued any instructions on matters of

general policy to the S.P.&S. to gain the concurrence of his opposite on the other hand?

A. It was.

Q. And if there had been any conflict in opinion neither one could have swayed the balance one way or the other so far as the S.P.&S. was concerned?

A. That is right. Until the two lines agreed, the two Northern lines, that something would be done nothing could be done" (R. 1984, 1985).

There is no question but that under certain conditions a railroad with less than majority stock ownership can control another. In *United States* v. *Union Pacific R. R. Co.* (1912), 226 U. S. 61, 95, 96, it was said:

> "But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent, which was afterwards somewhat increased and diminished until about 46% of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46% is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest."

In *Central of Georgia Ry. Co. Control* (1958), 307 I. C. C. 39, 42, the Commission said:

> "* * * considering the distribution of the outstanding stock, it is obvious that whether the Frisco owned 49.76 or 50.73 percent, it had at that time the power

to control the Central. The 252,633 shares owned by the Frisco on December 31, 1955, was equal to more than 66 percent of the total number of shares voted at the 1955 annual meeting of stockholders."

A holder of the majority of the shares voted at a shareholders' meeting, although constituting a minority of the total voting stock outstanding, would have actual control of a corporation. In the instant case, however, neither railroad has control of the S.P.&S. System because the voting power of each is completely neutralized by that of its competitor. Neither has the power to overcome the other and hence neither is under common management or control with the S.P.&S. System.

It is of interest that the Northern Lines apparently claim integration with the S.P.&S. System only when they try to justify discrimination against a connecting line. Various distance scales of rates are in effect in the states of Idaho, Montana, Oregon, and Washington on commodities such as brick, fertilizer, sand, gravel, crushed rock, grain, grain products, vegetables, hay, straw, lumber, shingles, forest products, cottonseed, railway cars, and any commodity moving under class rates. Under a distance scale the rate per mile decreases with the distance. A single rate for the entire distance, therefore, is lower than a combination of rates for respective segments of the entire haul. Under at least 14 separate tariffs, neither of the Northern Lines treats itself and the S.P.&S. System as a single line for rate purposes, but applies the distance rate scales on traffic interchanged with the S.P.&S. System separately to the distances over their respective lines instead of on a continuous mileage basis. One such tariff contains a list of lines under the same management or control which are to be treated as single lines in computing rates, but the S.P.&S. System and the Northern Lines are significantly absent from the list (R. 353, 354; Ex. 14).

By their past conduct in other matters, the Northern Lines have acknowledged that they are not under common management or control with the S.P.&S. System. The Articles of Organization of the North Pacific Coast Freight Bureau, which has jurisdiction over rates between points in Montana, Idaho, Washington, and Oregon, specifically provided, prior to the institution of the present proceeding, that each member railroad should be entitled to one vote, except where two or more carriers were under common management or control, such carriers would be considered as one member. The Northern Lines, as well as the S.P.&S. System, are signatory to the articles. From their inception, they were understood by all parties thereto as permitting the S.P.&S. System to cast its vote in proceedings before the Bureau, and it exercised that privilege without challenge by any railroad, including the Milwaukee. When the inconsistency of this practice with the Northern Lines' position in this proceeding became apparent, they initiated a proceeding before the Commission for approval of an amendment to the articles to provide specifically that the S.P.&S. System should have the right to vote (R. 2526).

The vice president—traffic of the Great Northern testified that all business off the S.P.&S. is considered competitive between the Northern Lines. S.P.&S. representatives are entirely neutral and cannot suggest to a shipper a routing over either the Great Northern or the Northern Pacific (R. 2231).

Whenever traffic moves via the S.P.&S.-Great Northern, the Northern Pacific is short-hauled the same as though it had moved via the S.P.&S.-Milwaukee. Likewise, the Great Northern is equally short-hauled whether the traffic moves S.P.&S.-Northern Pacific or S.P.&S.-Milwaukee. This is illustrated in *Helix Milling Co., Inc.* v. *Great*

Northern Ry. Co. (1952), 287 I. C. C. 77, cited by the Court below and the Commission. Joint rates were therein sought on wheat and wheat products from certain points in Montana to Portland via the Great Northern to Spokane, thence the Northern Pacific to Pasco, Washington and the S.P.&S. beyond. The Northern Pacific was agreeable to establishing the rates, but the S.P.&S., together with the Great Northern, vigorously resisted, claiming short-haul protection against the Northern Pacific. If as herein claimed, the Northern Pacific and the S.P.&S. System are under common management or control, the Northern Pacific could not short-haul the S.P.&S. System. The Commission recognized that a short-haul issue was present, discussed the requirements of Section 15(4), and made a finding of need for the through route sufficient to satisfy such requirements.

E. Summary of Part I.

It has been shown that:

A. The language and legislative history of Section 15(4), and

B. The enactment of Section 1(3)(b) in which mention of Section 15(4) was deliberately omitted, and the explanation thereof by the Senate-House Conference Committee, provide clear proof that Congress intended that the words "common management or control" in Section 15(4) be narrowly construed and not to include joint or collective management or control by minority interests;

C. Each major premise of the contrary conclusion by the Court below is erroneous; and

D. The undisputed evidence confirms that neither the Great Northern nor the Northern Pacific is under common management with or has control of the S.P.&S. System; that it is impossible to safeguard the long haul of each owner railroad, all S.P.&S. System traffic being competitive to both; and that

except when necessary to justify discrimination against a connecting line, the Northern Lines regard themselves neither as a single line with the S.P.&S. System nor as under common management or control therewith.

II. THROUGH ROUTES ALREADY EXIST VIA THE S.P.&S. SYSTEM AND THE MILWAUKEE MAKING SECTION 15(4) INAPPLICABLE.

Another reason that the limitations of Section 15(4) are not applicable is that the through routes already exist via the Milwaukee and the Commission need only prescribe just, reasonable, non-preferential and non-prejudicial joint rates thereover equal to the joint rates already in effect on traffic interchanged by the S.P.&S. System with each of the Northern Lines. Section 15(4) imposes no limitations on the Commission's power to prescribe joint rates over existing through routes. *United States* v. *Great Northern Ry. Co.* (1952), 343 U. S. 562, 575.

The Court below, without discussion, upheld the Commission's finding that with certain limited exceptions there are no through routes between points on the S.P.&S. System, on the one hand, and, on the other, points throughout the United States generally east of Spokane over the Milwaukee and its connections, within the meaning of Section 15(4).

A through route as previously stated, is merely:

> "An arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *St. Louis S. W. Ry. Co.* v. *United States* (1917), 245 U. S. 136, 139.

The Commission, in fact, conceded the existence of through routes via which joint rates are herein sought, when it said:

> "Routes are available to and from points on the S.P.&S., via Spokane, in connection with the complainant [Milwaukee] and its eastern connections, but generally shippers would have to pay combination rates if such routes were used. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the S.P.&S. over routes via Spokane in connection with the northern lines. The higher rates and charges act as deterrents to shippers and, in effect, close the Spokane gateway in a commercial sense insofar as the complainant is concerned." (R. 88.)

The question whether through routes exist, although commercially closed, was firmly settled by the Supreme Court in *Virginian R. Co.* v. *United States* (1926), 272 U. S. 658. In the earlier proceeding before the Commission, *Wyoming Coal Co.* v. *Virginian R. Co.* (1925), 96 I. C. C. 359, 362, counsel for the Virginian stated that the policy on that railroad was to discourage westbound movement from mines on its line and, in referring to the applicable combination rates, said:

> "They are not merely unreasonable rates. I will say frankly to your Honor that they are impossible rates."

The Supreme Court, fully cognizant that such rates were intentionally prohibitive of any movement, declared that through routes to the west nevertheless existed. 272 U. S. 658, 666.

This holding that mere commercial status does not determine the existence of through routes was followed in *General Mills, Inc.* v. *Great Northern Ry. Co.* (1947), 269 I. C. C. 457. There the Great Northern opposed granting of transit at Great Falls, Montana, on grain moving via Butte. It argued that the transit sought would create new through routes which could be required only upon a complaint specifically directed to that issue under Section

15(3) and a hearing thereon, followed by a finding of public necessity or desirability. As to this contention the Commission ruled that through routes already existed even though high combination rates on traffic transited at Great Falls kept them closed commercially, citing the *Virginian Ry.* case, *supra*, 272 U. S. 658. The Commission, defending in court its order requiring transit arrangements, argued persuasively in a reply brief filed October 27, 1948, pages 6, 7:

> "The fact that the combination is very high keeps the routes through Butte closed commercially, that is to say, the routes have not been and will not be used as long as the present high rates over them are in effect; nevertheless they are open legally."

The Commission was upheld in *Great Northern Ry. Co.* v. *United States* (1948), 81 F. Supp. 921 (D. Del.), affirmed, 336 U. S. 933.

In addition to the availability at higher combination rates of through routes via the Milwaukee and its connections east of Spokane, the S.P.&S. System offers through carriage over the Milwaukee—

(A) east of Spokane of *all commodities* moving in import-export traffic through port cities served by the S.P.&S. System to and from points on the Milwaukee and its connections throughout the country east of the Missouri River, as well as Wyoming, Colorado, and New Mexico;

(B) east of Spokane of lumber and forest products from origins on the S.P.&S. System to all local and some common points on the Milwaukee east of the Missouri River and west of Chicago; and

(C) east of the Twin Cities of all commodities between points on the S.P.&S. System and points on the Milwaukee and its connections (R. 149-151).

This service is offered through means of joint rates in which the S.P.&S. System joins with the Milwaukee. Joint rates of necessity presuppose through routes. *Southern Railway Company v. United States* (1957), 153 F. Supp. 57, 61 (W. D. N. C.) Aff'd, 355 U. S. 283. *United States v. Great Northern Railway Co.* (1952), 343 U. S. 562, 574.

Accordingly, through routes are available via the Milwaukee's lines east of Spokane (1) at higher combination rates for all commodities to which joint rates do not apply, and (2) at competitive joint rates for the commodities described in paragraphs (A) and (B) above. It is only over the Milwaukee's line east of Spokane to the Twin Cities that additional joint rates are herein sought, joint rates presently applying on all commodities via the Milwaukee's lines east of the Twin Cities as noted in paragraph (C).

The Commission, however, insists that through routes do not generally exist via the Milwaukee's line between Spokane and the Twin Cities and that the granting of any relief is, therefore, subject to the restrictions of Section 15(4). In reaching this conclusion, it relied upon *Thompson v. United States* (1952), 343 U. S. 549 and *Denver & R. G. W. R. Co. v. Union P. R. Co.* (1956), 351 U. S. 321. The *Thompson* case began with the filing of a complaint before the Commission in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.* (1950), 278 I. C. C. 519. Complainant sought the establishment of joint rates on grain from points on the line of the Missouri Pacific, of which Lenora, Kansas, was typical, to Omaha via Concordia, Kansas, thence the Chicago, Burlington and Quincy Railroad to Omaha. The Missouri Pacific had its own line from Lenora to Omaha via Kansas City and opposed the rates sought on the ground the Missouri Pacific would be shorthauled if traffic were interchanged at Concordia. There was no showing that any traffic moved

from Missouri Pacific origins through the Concordia Gateway via the Burlington to Omaha or to any point short of Omaha. The Commission, however, found the existence of through routes via Concordia.

In a suit to set aside the Commission's order, the District Court affirmed the Commission's finding of through routes, holding that the physical connection at Concordia plus long-established joint rates to some points on the Burlington short of Omaha plus combination rates to Omaha furnished a sufficient evidentiary support of the finding. *Thompson* v. *United States* (1951), 101 F. Supp. 48 (E. D. Mo.).

On appeal, *Thompson* v. *United States* (1952), 343 U. S. 549, the Supreme Court ruled that a mere physical connection at Concordia between two railroads and the publishing of local rates by each railroad to and from that point did not establish the existence of through routes to Omaha. Such publication merely showed compliance by the carriers with their statutory duty to publish rates between points on their own lines. Nor, the Court held, are joint rates to points on the Burlington short of Omaha proof of through routes to Omaha. It then said:

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." *ibid* 557.

In the absence of evidence that any traffic had ever moved from Missouri Pacific origins to Concordia, thence over the Burlington to Omaha, or that joint rates for such service had been published, this Court found there had been no showing that the Missouri Pacific offered through transportation over the route in question and held that

the Commission's order was without evidentiary support under the accepted tests for determining the existence of a through route.

In *Denver & R. G. W. v. Union P. R. Co.* (1953), 287 I. C. C. 611, the Rio Grande sought joint rates on all commodities via Ogden, Utah, with the Union Pacific between certain points in the Northwest on the Union Pacific and certain points in eastern Colorado on the Rio Grande and points easterly thereof throughout the United States. Joint rates already applied on sheep and goats from Union Pacific points in the Northwest, via Ogden, thence over the Rio Grande to destinations along the Missouri and Mississippi Rivers and certain other points. Only 55 cars moved per year via the Ogden Gateway to or from the Union Pacific points involved over the Rio Grande. None moved under the joint rates aforesaid, but on a combination of separately established rates. The Commission unanimously found through routes to exist with respect to sheep and goats.

With respect to other commodities, however, there was no majority opinion, the Commission dividing 5 to 5. The five commissioners who found through routes did not exist for such commodities said that the Rio Grande routes were not commercial or "effective" through routes, which, as previously noted, bears no relationship to their status as legally open through routes.

Five other commissioners were of the opinion that there were through routes on all commodities via the Ogden Gateway. In their opinion, the joint rates on sheep and goats proved the consent of the Union Pacific to the use of the Rio Grande route as part of a through route. They also relied on the fact that the Rio Grande route was in actual

and continuous use at combination rates on through bills of lading without opposition or objection by the Union Pacific or other railroads.

Suits were filed by the Rio Grande in a United States District Court in Colorado and by the Union Pacific in a United States District Court in Nebraska to set aside the Commission's order. The Court in Nebraska accepted the ruling of the five commissioners who found no through routes, except with respect to sheep and goats, existed. *Union Pacific R. Co.* v. *United States* (1954), 132 F. Supp. 72 (D. Neb.) The Court in Colorado, however, accepted the view of the other five commissioners that through routes existed with respect to all commodities, and held that the failure of the Commission so to find resulted in the Commission's erroneously applying the restrictions of Section 15(4), to the prejudice of the entire proceeding. *Denver & R. G. W. R. Co.* v. *United States* (1955), 131 F. Supp. 372 (D. Col.).

On appeals from the Nebraska and Colorado Courts, *Denver & R. G. W. R. Co.* v. *Union P. R. Co.* (1956), 351 U. S. 321, 328, the Supreme Court carefully withheld comment which would indicate agreement or disagreement with either group of Commissioners, saying:

> "Whether the evidence could have justified the Commission in finding the existence of through routes we need not determine."

The Court referred to the effect of the high combination rates via the Rio Grande route as handicapping, if not actually closing, the Rio Grande as an artery for traffic to and from the Northwest, but gave no indication whatever of reversing its ruling in the *Virginian Railway* case. In fact, it specifically disclaimed any ruling that such rates

necessarily show the absence of through routes, 351 U. S. 321, 328.

What particularly impressed the Court is apparent from its comment:

> "It quite plainly appears from the record that there has been a long-standing struggle between the Union Pacific and the Rio Grande over the efforts of the Union Pacific to keep the Ogden Gateway closed. We think the record supports the finding of the Commission that:
>
> > 'There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic.' 287 I. C. C. at 618.
>
> "'We adhere to the 'holding out' test of the *Thompson* case. The evidence before the Commission was not such as to compel it to find that the Union Pacific held itself out as offering through service over the Rio Grande lines.'' 351 U. S. 321, 330.

In contrast to the jealous guarding by the Union Pacific of its long haul, neither the Great Northern nor the Northern Pacific can nor does reserve to itself the long haul of S.P.&S. System traffic. The Northern Pacific, as previously noted, is short-hauled whenever S.P.&S. System traffic moves over the Great Northern, and vice versa.

Moreover the S.P.&S. System has joined with the Milwaukee in competitive joint rates via routes in which neither of the Northern Lines participate over the Milwaukee's line between Spokane and the Twin Cities (R. 149-151). Further, the S.P.&S. System and the Great Northern have joined with the Milwaukee, independently of the Northern Pacific, in joint rates between S.P.&S. System points on the one hand and Milwaukee points on the other in competition with the Northern Pacific (R. 2877).

These facts effectually refute the erroneous understanding of the Commission that:

> "'One fact stands out in this proceeding, namely, that it has always been the policy of the northern lines to preserve to themselves the long hauls on traffic originating or terminating on the S.P.&S. There is nothing of record to indicate that they have ever disagreed as to this.'' 300 I. C. C. at page 471 (R. 107).

There are further indications that the Northern Lines have not attempted to keep the Spokane Gateway closed to the Milwaukee, unlike the struggle of the Union Pacific to keep the Ogden Gateway closed. During 1952, 513 cars were interchanged between the S.P.&S. System and the Milwaukee at Spokane on through bills of lading (R. 107, 109). They consisted of the following commodities (R. 3117-3144):

Laundry equipment
Candy and confectionery
Food products in cans and packages
Starch
Manufactures and miscellaneous
Chemicals
Soap and cleaning and washing compounds
Furniture
Insecticides and fungicides
Livestock
Lumber and forest products
Petroleum and its products
Containers

Of these 513 cars, a Milwaukee witness testified that 387 moved under joint rates, consisting of 162 cars of lumber and forest products, five cars of manufactures and miscellaneous moving in export traffic, 31 cars of livestock, and 189 cars of petroleum products. Although the livestock and petroleum shipments, totaling 220 cars, probably did not, due to rate restrictions, move east of Montana, the remaining 293 cars could have moved over the entire line of the Milwaukee between Spokane and the Twin Cities, and beyond. It is evident that 126 of these cars moved under combination rates via the Milwaukee east of Spokane there being no movement under other joint rate tariffs than applicable to the 387 cars mentioned (R. 321-322).[14]

To summarize, the Milwaukee submits that:

(1) The Commission's recognition that routes utilizing the Milwaukee's lines east of Spokane are available at combination rates to the extent that joint rates do not already apply;

(2) The existence of joint rates, which presuppose through routes, on S.P.&S. System import-export traffic embracing every commodity which can move by rail, applicable over the Milwaukee's lines east of Spokane;

14. Another witness for the Milwaukee, in estimating the increased revenue had it received the long haul to or from Spokane on all traffic in which it participated, naturally eliminated cars interchanged at Spokane on which the Milwaukee already received the long haul. In doing so he commented that practically all of the traffic which originated or terminated on the Milwaukee and interchanged at Spokane moves on "through rates", but this does not conflict with the evidence indicating that 126 of all cars interchanged at Spokane (whether to or from points on the Milwaukee or its connections) moved on combination rates. A through rate is not necessarily a joint rate but may be a combination of separately established rates. *Virginian Ry.* v. *United States* (1926), 272 U. S. 658, 666; *General Mills* v. *Chicago R. I. & P. Ry.* (1932), 185 I. C. C. 789, 792.

(3) The existence of joint rates on lumber and forest products from S.P.&S. System origins via the Milwaukee's lines east of Spokane to all local points and some common points on the Milwaukee east of the Missouri River and short of Chicago;

(4) The failure of either Northern Line to guard its long haul against the other or to keep commercially closed the Milwaukee's route east of Spokane over which S.P.&S. System traffic is moving;

prove the existence of through routes over Milwaukee's line between Spokane and the Twin Cities via which additional joint rates are sought, and distinguish this case completely from the *Thompson* and the *Denver & R. G. W.* cases upon which the Commission relied in deciding that such routes do not already exist.

III. THE SHORT HAUL RESTRICTIONS OF SECTION 15(4) ARE ALSO INAPPLICABLE BECAUSE THE CONDUCT OF THE S.P.&S. SYSTEM IN REFUSING JOINT RATES VIA THE MILWAUKEE'S ROUTE BETWEEN THE TWIN CITIES AND SPOKANE IS A VIOLATION OF SECTION 3.

Section 15(4) is also inapplicable and imposes no restriction on the Commission's power to prescribe through routes when the refusal of a carrier to establish such routes results in a violation of Section 3.

> "The provisions of law which recognize the right of a carrier to its long haul are, as indicated in section 15(4) of the Interstate Commerce Act, subordinate to the provisions of section 3 of the act by which, among other things, any undue or unreasonable prejudice or disadvantage is prohibited." *Asphalt Between Calif. Points and To Salt Lake City* (1947) 268 I. C. C. 682, 685.

The Commission in disposing of the Section 3(1) issue (R. 141) quoted from *Union Pacific R. Co.* v. *United States*, 132 F. Supp. 72, 80:

> "The prohibition of section 3(1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this where the comparison of preferences or advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion."

The evidence disclosed preferences and advantages to persons and localities on the Great Northern and Northern Pacific and a corresponding disadvantage and prejudice to those on the Milwaukee. For action in concert or collusion by the S.P.&S. System, Great Northern, and Northern Pacific, the Commission need have looked no further than paragraph 7 of the answer of the S.P.&S. System to the amended complaint in the Commission proceeding in which the S.P.&S. System candidly admitted that it has denied the joint rates herein sought at the direction of the Great Northern and the Northern Pacific (R. 215).

Further, the S.P.&S. System is responsible for both the preference and prejudice even though its own line may reach neither the preferred or prejudiced points:

> "The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge. The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to

both points, and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same. So, too, a carrier may be responsible for preference or prejudice where it participates in one of several through routes between points of origin and the prejudiced destinations, although its own line may reach only one or neither of the latter, *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 62 L. ed. 199, 38 S. Ct. 49, for the discrimination is brought about by the disparity of rates, and the order requiring its abatement necessarily runs against all the carriers parties to them." Footnotes omitted. *Texas & P. R. Co* v. *United States* (1933), 289 U. S. 627, 648, 649.

The Commission, therefore, was clearly mistaken concerning the applicability of Section 3(1) and declined to grant relief thereunder in the face of conclusive evidence, to which we now turn, of undue and unreasonable advantage, preference, disadvantage, and prejudice.

The evidence of a Section 3(1) violation is particularly strong with respect to westbound lumber and forest products.

The center of lumber production has shifted since 1940 from Washington to Oregon (R. 292, 524, 718). The greatest concentration of lumber manufacturing plants is in the west half of Oregon, particularly in the area served by the S.P.&S. System (R. 718). Production of lumber and forest products in the Pacific Northwest greatly exceeds local needs and the bulk of it is marketed principally in the Midwest and East. The market is unpredictable with demand and prices fluctuating from day to day. There has developed a system of marketing by which so-called "transit cars" are started eastward billed to a convenient junction in the Midwest or East. When a buyer is found, the transit car is diverted to the buyer's station (R. 718).

The refusal of the S.P.&S. System to join with the Milwaukee in joint rates via the Milwaukee's line between Spokane and the Twin Cities, comparable to rates in effect via the lines of the Great Northern and Northern Pacific, has discouraged wholesalers from selling in the Milwaukee's territory west of the Twin Cities. Shippers regard the use of the Milwaukee's route as "too dangerous" or as "suicide" because of the penalty of higher combination rates if the shipment terminates at a point on the Milwaukee to which joint rates do not apply or on a connecting line (R. 360, 587, 720).

Conversely, lumber dealers at local points on the Milwaukee east of Spokane in Washington, Idaho, Montana, North Dakota, South Dakota, and western Minnesota are deprived of opportunities to purchase such transit cars originating on the S.P.&S. System (R. 399, 413, 831, 832).

Lumber mill operators at St. Maries and Santa, Idaho, local points on the Milwaukee, are deterred from buying cars of S.P.&S. lumber for remanufacturing, finishing, or to complete loading at their mills. The St. Maries mill operator, for example, is unable to purchase four out of five cars otherwise available to him from S.P.&S. System origins because of inability to sell the cars to wholesalers who, in turn, are deterred by the limited destinations to which competitive joint rates would apply (R. 371, 372, 374, 730, 731, and 732). The mills at St. Maries and Santa are competitive with mills at points on the Great Northern and Northern Pacific such as Coeur d' Alene, Idaho (R. 379). These competitors have the advantage of a full line of joint rates on lumber and forest products originating on the S.P.&S. System to all points east via the Great Northern and Northern Pacific (R. 143, 323).

The situation confronting the mills at St. Maries and Santa is closely parallel to that of a flour mill at Milton—

Freewater, Oregon. This mill, located on the Union Pacific, had obtained from 35 to 52 per cent of its spring wheat requirements from origins in Montana on the Milwaukee. The production of spring wheat shifted, however, to areas adjacent to the Great Northern. Joint rates from Milwaukee origins applied via the Milwaukee to Spokane thence via the Union Pacific to the mill for milling with further movement to points in southern Oregon and California. From Great Northern origins only combination rates applied to the mill and points beyond. The mill operator sought the establishment of joint rates via the Great Northern—Union Pacific, charging that the existing rates were unlawful, unreasonable, unduly prejudicial to its mill, and unduly preferential of its competitors' mills on other routes over which joint rates applied. The Commission, in *Preston-Shaffer Milling Company v. Great Northern Ry. Co.* (1958), 304 I. C. C. 491, found that the flour mill operator was unduly prejudiced and its competitors on other routes were unduly preferred by the refusal of the Great Northern to enter into joint rates via the Great Northern-Union Pacific route, notwithstanding the evidence disclosed that the mill operator had increased its sales to California points despite the rate disparity.

The Great Northern brought suit to set aside the order of the Commission requiring joint rates via the Great Northern-Union Pacific, but the District Court upheld the finding by the Commission of undue preference and prejudice under Section 3(1). The Great Northern's contention that it would be deprived of the long-haul protection guaranteed by Section 15(4) was brushed aside by the Court which held that the prohibition against short-hauling does not apply in the face of a violation of Section 3.

Great Northern Railway Company v. *United States* (1959), 172 F. Supp. 705, 707, 708[15] (D. Minn.).

In the foregoing proceeding, the Commission gave heed, as it failed to do in the instant case, to its own statement in *Mayo Shell Corp.* v. *Baltimore & O. R. Co.* (1955), 295 I. C. C. 133, 135:

> "The duty of a carrier to give substantially equal treatment to all shippers who are in a position to demand it includes the right to reach competitive markets on relatively equal terms. A rate preference may not be accorded a shipper without a material difference in transportation conditions justifying the preference. An unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference where, as here, the rates are under the effective control of the participating carrier or carriers."

In the present case, there is no material difference in transportation conditions justifying the preference, the Commission finding that the operating conditions on the routes of the Milwaukee, Great Northern and Northern Pacific, mile for mile, are substantially similar (R. 112).

A violation of Section 3(1) with respect to lumber and forest products is all the more apparent because the marketing thereof is a highly competitive business with the margin of profit so low that the distributor can not absorb the increased cost of reaching areas where competitive joint rates do not apply (R. 394, 720).

> "When sales are made under keen competition in common markets, as they are here, the correlative of

15. The Great Northern appealed from the judgment of the District Court and this Court noted probable jurisdiction. *Great Northern Railway Co.* v. *United States* (1959), 361 U. S. 860. Thereafter, upon joint motion of counsel suggesting mootness, this Court vacated the judgment of the District Court and remanded the case with instructions to dismiss the complaint as moot. *Great Northern Railway Co.* v. *United States* (1960), 362 U. S. 939.

the advantage gained from the lower rate level must be a detriment or injury to a competitor who must ship on the higher level. *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 201 I. C. C. 165, 206 I. C. C. 445; sustained in *Chesapeake & O. Ry. Co.* v. *United States*, 296 U. S. 187." *Consolidated Mining & S. Co. of Canada* v. *N. Y. C. R. Co.* (1956), 299 I. C. C. 231, 244.

There is no question that Congress intended by Section 15(4) to permit a railroad to retain a long-haul over its own line, as well as the line of an intermediate railroad operated in conjunction and under common management or control therewith. Clearly, such railroads should be regarded as one railroad and the preservation to itself of the long-haul could not be regarded as discrimination against connecting carriers under Section 3(4). Should a railroad, however, which connects at the same point with three competing railroads, join in lower rates with two of such railroads and refuse equal treatment to the third, it is in violation of Section 3(4).

As pointed out in Part I of this argument, it is impossible for a railroad to be under common management or control and hence can not be regarded as a single line, with each of two independent competing railroads which are not themselves under common management or control with each other.

In *Dixie Carriers* v. *United States* (1956), 351 U. S. 56, 58, 60, this Court held that Section 3 outlaws discrimination in all its forms. It upheld the contention of appellant common carriers by water, who are included within Section 3(4), that it is unlawful thereunder for a railroad to refuse to join in through routes and joint rates with a water carrier when it has already joined in such routes and rates with a connecting rail line. It is equally unlawful under Section 3(4) for a railroad to refuse to join in

joint rates or through routes with a connecting railroad when it has already joined in such rates or routes with other railroads.

The Milwaukee submits, therefore, that the Commission was in error with respect to:

(1) Its understanding that there could be no violation of Section 3(1) by the S.P.&S. System because of the absence of concerted action or collusion;

(2) Its holding of no violation of Section 3(1) with respect to shippers of lumber and forest products; and

(3) The failure to find a violation of Section 3(4) with respect to the discrimination by the S.P.&S. System against the Milwaukee in favor of the Northern Lines.

By reason of these errors and those discussed in Parts I and II of this argument, the Commission mistakenly concluded that it was bound by the short-haul restrictions of Section 15(4) and that it was, therefore, unable to grant the relief herein sought by the exercise of its powers under Sections 15(1) and 15(3).

IV. ASSUMING ARGUENDO THAT SECTION 15(4) IS APPLICABLE, THE REQUIREMENTS THEREOF ARE FULLY SATISFIED.

Even if Section 15(4) were applicable, however, the evidence with respect to various commodities completely satisfies the conditions of Section 15(4) which permit short-hauling if new through routes are needed to provide adequate and more efficient or more economic transportation.

The Examiner who heard the testimony, following an extended discussion of the evidence (R. 245-281) reached the following conclusion:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more eco-

nomic transportation, that through routes and joint rates over such routes the same as apply over routes composed of the S.P.&S., and each of the northern lines and their connections be established via Spokane, in connection with the Milwaukee, on lumber and forest products, fresh fruits and vegetables, and livestock, in carloads, from points on the S.P.&S. to destinations in the United States east of Spokane, and to destinations on the S.P.&S. from points east of Spokane on coal, furnifure, agricultural implements, grain,[16] iron and steel grain bins, and hogs, in carloads, and on coal, in carloads, from Roundup, Mont.''[17] (R. 281.)

It will be seen from the following discussion that the Examiner's conclusions were fully supported by the evidence and that the Commission's contrary conclusions (R. 141, 142) are erroneous; arbitrary, and not supported by substantial evidence.

The Commission's reversal of its Examiner was obviously influenced by certain misapprehensions with respect to (1) the alleged similarity of the instant case to *Western Pac. R. Co.* v. *North Western Pac. R. Co.* (1933), 191 I. C. C. 127, in which there was no public demand for joint rates via the complainant's line; (2) the alleged general traffic policy of carriers serving the Pacific Northwest, including the Milwaukee, of safeguarding their long haul; and (3) wide open unrestricted routing at competitive joint rates for lumber and forest products as supposedly an issue in this proceeding.

The Commission after quoting the following from the *Western Pacific* case:

> ''In requesting the application of joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence

16. See footnote 11, p. 15 *supra*.

17. Coal production has since been discontinued at Roundup.

of emergency, to the Northwestern Pacific and Southern Pacific."

said:

> "The instant complainant [Milwaukee] likewise is not here as a shipper or receiver of traffic, but solely as a carrier seeking to participate in traffic which the S.P.&S. and the northern lines refuse to relinquish." (R. 137.)

It was stressed in the *Western Pacific* case that the complainant could not offer a route shorter than the long-haul route of the defendant carriers; and that it did not originate or deliver any of the traffic in issue but sought to participate therein merely as a bridge carrier (191 I. C. C. at 136). The record in the present proceeding shows that out of 168 examples the distance between representative points on the S.P.&S. System and large commercial centers throughout the country is shorter in 88 cases via the Milwaukee route than via either the Great Northern or Northern Pacific routes. In each remaining case the Milwaukee route is shorter than one of the other two routes (R. 335-337).

Contrary to the impression which defendant carriers have attempted to convey to the Commission, with some apparent success, the Milwaukee seeks to participate not merely as a bridge carrier, but also in the long haul of traffic originating and terminating on its own railroad. The record shows that of the 5,874 cars moving annually to or from S.P.&S. System points on which the Milwaukee was short-hauled, 3,316 originated or terminated on the Milwaukee (R. 3117-3144). This is traffic (to paraphrase the *Western Pacific* case) which, under the Act, belongs as much or more to the Milwaukee as to the Northern Lines.

The Commission's report in the *Western Pacific* case gives no indication of any support of complainant by shipper interests. In the present proceeding, the following

intervened on behalf of the Milwaukee before the Commission:

Secretary of Agriculture of the United States
Western Forest Industries Association
National Livestock Producers Association
Chicago Producers Commission Association
American National Cattlemen's Association
National Wool Growers Association
Traffic Bureau of Sioux Falls, South Dakota

and 36 commercial witnesses and a witness for the Secretary of Agriculture testified to a need for the joint rates.

In support of its statement that the general policy of carriers serving the Pacific Northwest, including the Milwaukee, is not to apply joint rates via all junctions, but, on the contrary, for each carrier to guard its own long haul, the Commission cited two cases decided in 1917 and 1928, *West Coast Lumber Mfrs. Assn.* v. *Tacoma E. R. Co.* (1917), 45 I. C. C. 227; *Routing from Points on Spokane, C. D. & P. Ry.* (1928), 142 I. C. C. 230. Had the Commission selected cases of more recent vintage it would have found that it now requires, as a condition to its approval of acquisition of control by one carrier of another, that the acquiring carrier cancel no joint rates and through routes in effect via the acquired line and other carriers. *Pacific Coast R. R. Co. Control* (1951), 282 I. C. C. 600; *Spokane International R. Co. Control* (1956), 295 I. C. C. 425.

The Commission was likewise mistaken with respect to the policy of the Northern Lines in connection with S.P.&S. traffic when it said:

> "One fact stands out in this proceeding; namely, that it has always been the policy of the Northern lines to preserve to themselves the long hauls on traffic originating or terminating on the S.P.&S. There is nothing of record to indicate that they have ever disagreed as to this." (R. 107.)

The S.P.&S. System, as noted in Part II hereof, joins with the Milwaukee in joint rates on various commodities to and from points on the Milwaukee via Spokane in competition with routes via the Northern Lines. These joint rates include rates on lumber and forest products from S.P.&S. System origins to most points on the Milwaukee short of Chicago. They also include export and import rates on traffic through ports served by the S.P.&S. System to and from all points on the Milwaukee and on its connecting lines as well (R. 149). Further, the S.P.&S. System and the Great Northern join with the Milwaukee, independently of the Northern Pacific, in many joint rates between S.P.&S. System points on the one hand and Milwaukee points served in competition with the Northern Pacific on the other (R. 2877).

The Milwaukee itself does not attempt to monopolize the long hauls over its line between Spokane and the Twin Cities, but accepts eastbound shipments and yields westbound shipments at the latter gateway. (R. 320).

The Commission discusses in some detail the extensive evidence submitted of the need for through routes over the Milwaukee's line between Spokane and the Twin Cities with respect to various commodities (R. 123-136).

Lumber and Forest Products.

In finding that the evidence was not sufficient to require the establishment of joint rates on lumber and forest products via Spokane over the Milwaukee and its connections, the Commission referred to (1) the desire of certain shippers for wide open, unrestricted routing at competitive joint rates; (2) joint rates already in effect from S.P.&S. System origins to destinations on the Milwaukee and its connections via the routes of the Northern Lines between Spokane and the Twin Cities; (3) joint rates in effect

from S.P.&S. System origins served also by the Union Pacific or Southern Pacific to most destinations on the Milwaukee and over lake routes to Official territory[18] which rates apply on traffic interchanged by the Union Pacific with the Milwaukee at Marengo, Washington; and (4) joint rates from origins on the Union Pacific and Southern Pacific to substantially all parts of the United States via Omaha, Nebraska, or El Paso, Texas (R. 139-140).

Concerning the desire of certain of the shipper witnesses for wide open, unrestricted routing at competitive joint rates, the Commission stated that while this would undoubtedly be desirable from the shippers' point of view, there is no clear showing that it would be in the public interest or that it is needed to provide adequate and more efficient or more economic transportation. Obviously, the Commission attempted to place a burden of proof on the Milwaukee entirely unwarranted by the scope of the relief sought. The Milwaukee did not ask for a blanket order for wide open routing on lumber and forest products, or any other commodity. The relief sought by the Milwaukee and its supporting shippers is confined to joint rates on traffic which moves over its line between the Twin Cities and Spokane, when interchanged at Spokane with the S.P.&S. System. To require the Milwaukee to justify such relief by showing that wide open unrestricted routing is in the public interest or needed to provide more adequate and economic transportation is arbitrary in the extreme.

The inadequacy for lumber mill operators in Idaho and lumber wholesalers of the present through routes by reason of the limited joint rates applicable thereover has been previously noted in Part III of this argument.

The joint rates already in effect from S.P.&S. System

18. Official territory lies generally east of the Illinois-Indiana line and north of the Ohio River.

origins via the Northern Lines between Spokane and the Twin Cities are of no help to the shipper of transit cars who desires to try the market along the Milwaukee's line between Spokane and the Twin Cities without the danger of being caught in a pocket market. They are of no help to the shipper who desires to stop a car along the Milwaukee's line between Spokane and the Twin Cities for completion of loading, milling in transit, or partial unloading with final delivery to any point on a connection of the Milwaukee or to several important points on the Milwaukee.

The need for the relief sought is amply shown not only by the testimony of lumber manufacturers and wholesalers in the Pacific Northwest mentioned by the Commission (R. 125-126), but also by testimony on behalf of Midwestern lumber dealers.

A retail lumber company with eighteen yards in Wisconsin, of which ten are served by the Milwaukee and eight by the Chicago and North Western Railway, supports the Milwaukee in order that it may stop cars originated on the S.P.&S. to complete loading at the St. Maries lumber plant at St. Maries, Idaho. Present needs of this Wisconsin company call largely for shipments in mixed cars, including particularly Idaho white pine such as is sold at St. Maries. White pine available elsewhere is being received in declining quantities, necessitating new sources of supply. Under joint rates sought by the Milwaukee, this company could obtain lumber from S.P.&S. origins with a stop-off at St. Maries, Idaho, a point served only by the Milwaukee, to complete loading, and then could move the car to any one or more of its Wisconsin yards, including three on the Milwaukee and five on the Chicago and North Western Railway, to which joint rates on such shipments do not now apply (R. 797-803).

A shipper witness frequently stops cars at points on the Milwaukee, such as St. Maries, to complete loading lumber specialties, but has difficulty moving such cars east of Mobridge, South Dakota, without the rates sought from S.P.&S. System origins (R. 520-525).

One company which purchases lumber from mills on the S.P.&S. System has a market extending from the western border of North and South Dakota to the Atlantic Coast. It also has warehouses in St. Paul, Chicago, Kansas City, Baltimore, and Elizabeth, New Jersey. This company holds itself out to take care of any retail lumber dealer wherever located. It has much combination business, wherein a customer buys part of a car which is stopped for part unloading and is then moved to one of the eastern warehouses to complete unloading (R. 444-450).

A lumber wholesaler is unable under existing joint rates to reach customers at local points on the Milwaukee's lines in Iowa, *viz.*, Clear Lake, Buck Grove and points west, with part unloads, and then move the car to its retail yard in the Chicago District to complete unloading when the shipment originates on the S.P.&S. System (R. 1012).

A spokesman for seven operators of approximately 116 retail lumber yards located in North Dakota, South Dakota, Iowa, Minnesota, Montana, Nebraska, and Wisconsin, testified to their inability to route cars originating on the S.P.&S. System over the Milwaukee's line from Spokane when stopped for part unloading at a local point on the Milwaukee, thence moving to a point served jointly by the Milwaukee and other carriers, such as Linton, North Dakota, La Crosse, Wisconsin, and Des Moines, Iowa. On such shipments joint rates do not apply and they support the Milwaukee's request therefor (R. 827-832).

The Marengo route, mentioned by the Commission, is entirely inadequate to meet the shippers' needs. No sub-

stantial amount of tonnage moves thereover due to: the denial by the Union Pacific and Southern Pacific of stop-off privileges on their lines for completion of loading or milling in transit; and the restriction of these rates to lumber terminating (1) on the Milwaukee's lines; (2) at points on connecting lines on and north of its Omaha-Chicago line, and (3) at points north of the Ohio and Potomac Rivers via cross-lake routes only (R. 328, 329, 2856). Thus, the users of the Marengo route, in addition to losing transit privileges on the Union Pacific and Southern Pacific, are also barred from reaching substantial territory in the midwest, and all of the southwestern, southern, and southeastern parts of the United States. The cross-lake routes over which shippers can reach a limited portion of the territory east of Chicago are also objectionable to shippers because they generally entail a much longer time than the customary routes via Chicago (R. 1537).

Likewise, joint rates from Union Pacific and Southern Pacific origins via Union Pacific to Omaha, or the Southern Pacific to El Paso, Texas, are of no value to a shipper desiring to use the Milwaukee's line west of the Twin Cities. Nor do such rates help a shipper from local S.P.&S. System origins.

It is obvious that the Commission was affected in its decision by the contention of the S.P.&S. System and the Northern Lines that the principal reason some shippers desire the S.P.&S.-Milwaukee route is that it would permit them to consign transit cars to points which would delay the movement thereof. Referring to such contention, the Commission said:

> "We have never condemned reasonable transit or diversion privileges, such as stopping for partial loading and unloading, the diversion of a car from one destination to another, stopping for milling or fabrication, or storage, where the nature and sale of a

> commodity requires such privileges, but the improper use of freight cars has been looked upon with disfavor. While it is not within our province to pass upon the respective merits of the two methods of merchandising lumber, namely, firm sales and transit sales, the deliberate routing of traffic so as to slow the movement thereof is a practice which cannot be regarded as in the public interest." (R. 127.)

The Commission specifically referred to Canton, South Dakota, 180 miles south of the Milwaukee's main line point of Aberdeen, South Dakota, to which lumber shipments have been consigned and later diverted to the Twin Cities or Duluth (R. 127).

Although important evidence was introduced through witnesses primarily engaged in that rapidly expanding part of the lumber industry which utilizes transit cars, there were also included among the Milwaukee's supporting witnesses one whose firm (non-transit) sales constitute 25 to 50 per cent of his business (R. 586); another with 50 per cent firm sales (R. 731); four with 60 per cent firm sales (R. 530, 574, 606); and two with 100 per cent firm sales (R. 381, 486).

Transit cars do not necessarily move via slow routes (R. 1897; 1910). Fast service on all types of shipments is frequently needed. In the words of an Iowa retail lumber dealer:

> "Quite often it is very important to us in saving time in transit on cars of lumber which are urgently needed and we feel certain that if the Milwaukee Railroad has the same privileges that some of the other lines have in the northwest, that this would be definitely beneficial to our cause" (R. 917).

Further, Canton, South Dakota, used by the Commission as an example of an off line point to which cars are billed, is at the intersection of two trunk lines of the Mil-

waukee, one running 796 miles east-west between Watertown, Wisconsin, and Rapid City, South Dakota, and the other running 122 miles north-south, connecting three of the Milwaukee's main east-west lines (App. B). From this location cars can be quickly moved east, west, north, or south, and only on certain traffic moving north is any back haul required.

The following portion of the summary of evidence by the Commission establishes a clear need for the relief sought:

> "This evidence, in substance, is that the marketing of western lumber and forest products requires flexible and liberal routing, together with liberal transit privileges. Economical transportation costs, resulting from competitive through rates, are necessary because the production of these products in the Pacific Northwest greatly exceeds local needs and the bulk of it is marketed principally in the Midwest and East in competition with lumber produced in the South and elsewhere; the center of western lumber production is constantly shifting; the market is unpredictable with demand and prices fluctuating from day to day, thereby necessitating the diversion of cars from a weakening market to one of greater strength; and in recent years, retail lumber yards, the best customers of western lumber producers, have been replenishing their stocks at frequent intervals. To meet this demand and also to avoid cancellation of firm orders by purchasers, when mills are sometimes prevented from making shipments when specified because of car shortage, there has developed the custom of loading and shipping so-called transit cars, which are billed to a convenient junction point in the Midwest or East. The seller, usually a wholesaler, when a buyer is found diverts the transit car to the buyer's station.
>
> "The transit method of merchandising necessitates flexible routing, and shippers are reluctant to ship a transit car over a route which does not have competitive through rates. The members of the afore-

mentioned association are not large enough to have their own sales organizations and must rely mainly upon wholesalers, such as those who engage in transit shipping to sell their output. Presently, some wholesalers make no effort to sell lumber produced at mills on the S.P.&S. in Milwaukee territory because, if they ship via Spokane in connection with the Milwaukee, they cannot move the cars out of Milwaukee local-territory points without paying higher rates. Such points are called closed or pocket markets.

"Persons actively engaged in the business of manufacturing or marketing lumber produced in the Pacific Northwest, and others who purchase such lumber, offered evidence which confirms, in the main, the evidence discussed above" (R. 123-125).

The needs of lumber shippers, in this regard, are practically identical to those who market fresh fruits and vegetables, dried beans and other agricultural commodities for which through routes and joint rates were prescribed in *Denver & R.G.W. R. Co.* v. *Union Pac. R. Co.*, 287 ICC 611; *aff'd, Denver & R.G.W. R. Co.* v. *Union Pac. R. Co.*, 351 U. S. 321. The Commission in the *Rio Grande* case summarized the evidence of the receivers and shippers as showing:

"In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

"In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets." 287 I. C. C. at 642.

Grain.

The evidence with respect to grain was summarized by the Commission as follows:

"*Grain.*—A wholesale grain dealer at Seattle buys corn from dealers in Minneapolis, Sioux City, and Omaha, as well as at country origins in the Midwest, which is sold in the Pacific Northwest. Generally, when a car is shipped from the origin point the ultimate destination is not known. In such instances the cars are usually billed for diversion to either Spokane or Seattle with the delivering carrier specified. If a shipment cannot be diverted from Spokane, for example, at the balance of a joint through rate from origin to destination, the buyer will either refuse the shipment or insist on a substantial discount. It is important to this company, therefore, to have widespread routes, Spokane and west, which will permit liberal use of transit privileges. The absence of joint through rates on westbound shipments of grain from Milwaukee origins to destinations on the S.P.&S. on traffic routed over the Milwaukee via Spokane tends to cause this company to limit the shipment of corn from Milwaukee origins to Spokane to that which may be disposed of at destinations on the Milwaukee, and this situation results in frequent shortages for such destinations. There are, however, joint through rates on corn from Milwaukee origins to destinations on the S.P.&S. on traffic routed over the Milwaukee to Terry, Mont., the Northern Pacific to Spokane, and the S.P.&S., which traffic may be diverted to such destinations at Spokane at the transit balance. Shipments from origins on the Milwaukee may also move over that carrier to Spokane and be diverted to many destinations on the Union Pacific when routed over the Milwaukee to Marengo without rate penalty when the inbound rate from the primary origin to Sioux City, for example, does not exceed 19.5 cents.

"Evidence was offered by the Omaha Grain Exchange whose members do a general grain business

in the terminal market of Omaha. Corn which originates on the Milwaukee and moves into the Omaha market for storage and subsequent movement may not be shipped to destinations on the S.P.&S. at joint through rates when routed over the Milwaukee via Spokane, but, as indicated, it could move under joint through rates when routed over the Milwaukee and the Northern Pacific via Terry. The testimony is to the effect that with more flexible routing, as herein sought, these grain dealers would be in a better position to compete with other midwestern markets, such as Minneapolis and Sioux City, but the record is somewhat vague in this respect.

"It appears to be the general practice of the transcontinental carriers which bring the corn into Spokane to limit the use of transit balances to destinations on their respective lines. For example, corn moved over the Great Northern from Minneapolis to Spokane could not be diverted at joint through rates or rate balances to destinations on the Milwaukee or the Northern Pacific, and that which moved into Spokane over the Northern Pacific could not be diverted at transit balances to destinations on the Milwaukee or the Great Northern. Such shipments, however, could be diverted at Spokane to destinations on the respective lines of the inbound carrier or to destinations on the S.P.&S. under joint through rates. Representatives of two other grain dealers in Pacific Northwest territory testified that they have experienced no difficulties in handling their products over the present through routes and see no necessity for opening the routes sought" (R. 127-129).

The Commission dismissed the need for competitive joint rates on grain from Milwaukee origins in the midwest to S.P.&S. System destinations via Spokane with the single statement that there is routing open on corn from Milwaukee origins to S.P.&S. System destinations over the Milwaukee to Terry, Montana, thence the Northern Pacific and S.P.&S. (R. 140). Once the corn is surrendered to the

Northern Pacific, however, the shipper can no longer divert it to Milwaukee destinations without a rate penalty. On the other hand, if the traffic is routed via the Milwaukee beyond Terry, it can not be diverted to S.P.&S. System points except under a rate penalty. Generally, when corn is shipped from the origin point, the ultimate destination is not known. This, as the Commission noted, causes the shipper to limit the shipment of corn from Milwaukee origins to Spokane to that which may be disposed of at destinations on the Milwaukee, and results in frequent shortages for such destinations.

The alternate route via the Milwaukee to Marengo, Washington and thence the Union Pacific to destinations on the latter railroad, referred to by the Commission, can be used without rate penalty only when the inbound rate from the primary origin does not exceed 19.5 cents. A shipper testified, however, that 95 per cent or more of the corn shipped has an inbound rate higher than 19.5 cents (R. 700).

Fresh Fruits and Vegetables.

Commission's summary of evidence:

"*Fresh fruits and vegetables.*—Testimony as to the desirability of the through routes and joint rates sought on fruits and vegetables was submitted by an officer of a company engaged in the sale and distribution of these commodities at Mitchell and Sioux City, both located on the Milwaukee. This company obtains fresh fruits and vegetables from various parts of the country. It handles from 600 to 800 carloads a year, approximately 100 of which are shipped from the Pacific Northwest. An average of about one a week is rejected for various reasons. The rejected shipments must be resold and it is necessary, in order for the distributor to maintain good relations with suppliers and brokers, to have a wide territory to which these cars may be reshipped.

"Through routes and joint rates are in effect on these commodities from various origins on the Southern Pacific and the Union Pacific, many of which are common with the S.P.&S., over the Union Pacific to Marengo and the Milwaukee beyond to both Mitchell and Sioux City, but shipments over this route cannot be diverted without rate penalty to destinations south of the Milwaukee's line from Omaha to Chicago. From origins on the S.P.&S., through routes and joint rates apply via Spokane, thence the Northern Pacific to Oakes, N. Dak., and the North Western and the Milwaukee, or via Spokane, thence the Great Northern to Willmar, Minn., and the Milwaukee, but these routes are said to be undesirable because of delays and circuity. There is, however, a through route and joint rates from S.P.&S. origins via Spokane, thence the Northern Pacific to Jamestown, N. Dak., thence the line of the Midland Continental Railroad to Edgeley, S. Dak., and the Milwaukee through Aberdeen to Mitchell and Sioux City, which is said to be as desirable in all respects as the route sought via Spokane, thence the Milwaukee." (R. 129-130.)

The Commission, however, minimized the importance of the fruit and vegetable supply in S.P.&S. System territory by comparing the total production at points served *exclusively* by that carrier with the total production in Oregon and Washington (R. 140). Although another railroad may serve points at which fruits and vegetables originate, the shipper located only on the S.P.&S. System might have no opportunity to use the other carrier without additional cost. Accordingly, the production at all S.P.&S. System origins is a more significant figure and compares with the production at local S.P.&S. System points relied upon by the Commission as follows:

Commodity	Carloads—S.P.&S. local origins	Carloads—S.P.&S. all origins
Apples	44	44
Cherries	0	14
Pears	244	244
Potatoes	0	3257
Onions	0	109

The alternate route from S.P.&S. System origins to Milwaukee destinations via the S.P.&S. Northern Pacific, Midland Continental, and Milwaukee was suggested by the defendant railroads but they significantly made no attempt to compare the schedule for perishables over the suggested four-line route with that available over the two-line S.P.&S.-Milwaukee route.

Furniture.

Commission's summary of evidence:

"*Furniture*:—A company at Seattle distributes school furniture and equipment, theater equipment, church furniture and equipment, and similar items, most of which comes from a manufacturer at Menominee, Mich. It also obtains these items from Jasper, Ind., Chicago and Aurora, Ill., Liberty, N. C., and Waco, Tex. It sells to buyers at points in various States, including points in Montana and S.P.&S. points in Washington and Oregon. This distributor never knows in advance of the actual receipt of orders just when or where deliveries are to be made. It has been dealing in theater equipment extensively in Montana for many years, and sales of school and church furniture are now being developed there with the expectation of a substantial increase in the volume of business. Furniture and equipment have been sold at such S.P.&S. points as Camas and Pasco, Wash, and Rainier, Eugene, Albany, Salem, and numerous other points

throughout the Willamette Valley in Oregon. The distributor deals extensively in part carloads and utilizes the privilege of stops for partial unloading. The bulk of the furniture shipped from Menominee starts in carload lots, which are frequently combined shipments for various stops en route. If the occasion were to arise, it would be a convenience for it to combine shipments to points in Montana on the Milwaukee with shipments to points on the S.P.&S., which it cannot do under the present rates.

"The record shows the details concerning 35 carloads shipped on and between August 12, 1952, and November 11, 1954, from Menominee to the Pacific Northwest, which are representative of the carloads stopped for partial unloading in that period. Of these, only one carload was partially unloaded at a point served exclusively by the S.P.&S. This car was routed over the Milwaukee-Great Northern to Seattle where it was partially unloaded and the remainder moved to Rainier, Oreg. The traffic manager of a large manufacturer of school, theatre, and church furniture at Grand Rapids, Mich., testified that his company makes shipments to destinations in Montana, Oregon, and Washington, and he has never experienced any difficulty in making stops in transit under the present rates and routes" (R. 131-132).

The Commission concluded that there appears to be no real need for through routes and joint rates in connection with the Milwaukee via Spokane to destinations on the S.P.&S. System on church and school furniture and equipment and theatre equipment, since numerous routes are now available in connection with the Northern Lines and shipments may now be stopped at points on the Milwaukee for partial unloading when the remainder is destined to a point served by the Milwaukee (R. 140). The "numerous routes" to S.P.&S. System destinations offer the shipper

a choice west of the Twin Cities of just two railroads, the Great Northern or Northern Pacific. The third transcontinental line, the Milwaukee, is excluded. It is because a shipper is tied down to Milwaukee destinations when using the Milwaukee's line between the Twin Cities and Spokane that joint rates are now sought. Such rates would enable him to partially unload at a Milwaukee point and complete unloading at an S.P.&S. System point, instead of shipping less than carload quantities at higher rates, warehousing excess materials at Spokane, or holding up shipments until they can be matched with others under existing joint rates (R. 634, 1448, 1449).

Iron and Steel Grain Bins.

Commission's summary of evidence:

> "*Iron and steel grain bins.*—A manufacturer and shipper of iron and steel grain bins, among other things, is located at Sioux Falls, on the rails of the Milwaukee. This concern is the largest manufacturer in the United States of diversified sheet-steel farm equipment. In 1953 it used 16,000,000 pounds of iron and steel, and its estimated use thereof in 1954 was 24,000,000 pounds. Most of this company's inbound tonnage is moved by the Milwaukee, and most of its outbound tonnage moves out over that road under fabrication-in-transit privileges, which are more liberal than those published by the northern lines. The Great Northern, which also serves Sioux Falls, publishes limited transit privileges at that point on westbound and transcontinental iron and steel traffic when moving over certain routes through Snowden, Mont., or Fort Buford, N. Dak. The tariff covering such tonnage from origin territory east of Chicago provides routes through Sioux Falls on the Great Northern only when the movement into Sioux Falls is by the Illi-

nois Central Railroad Company, or the Burlington to Sioux City and the Great Northern to Sioux Falls. The witness for this manufacturer testified that these routes are not ordinarily used as it would be necessary, when shipping over the Great Northern to S.P.&S. points, for the company to determine in advance the number of carloads it might ship over this route and then order a sufficient number of carloads of iron and steel routed into Sioux Falls over the Illinois Central or the Burlington-Great Northern routes; that if too many carloads were ordered, the company would lose valuable transit privileges on the unused balances; and that, for all practical purposes, this company, because of the existing rate situation, cannot now ship to points on the S.P.&S. over any route and is thereby to this extent, handicapped in the sale of its grain bins. One of this company's principal competitors is located at the Twin Cities and is able to ship over either of the northern lines to S.P.&S. points without routing restrictions on its inbound traffic.

"The defendants assert, and it is not denied by the complainant, that iron or steel may be routed into Sioux Falls over the Illinois Central or the Burlington-Great Northern, be fabricated thereat, and reshipped under the Milwaukee transit tariff to Pacific coast destinations over the Milwaukee direct or over that carrier in connection with the Union Pacific and the Southern Pacific, and many of the destinations on the latter two carriers are common with the S.P.&S. Thus, it is contended that there would not likely be a surplus of unused transit balances." (R. 132-133.)

The Commission disposed of the need for joint rates on iron and steel grain bins and agricultural implements westbound via the Milwaukee to Spokane and thence to S.P.&S. System points by simply stating:

"Adequate routing also appears to be available in connection with westbound shipments of agricultural implements and grain bins." (R. 140.)

As to grain bins, the evidence showed that the Sioux Steel Company, which manufactures iron and steel grain bins in Sioux Falls, South Dakota, is located on the Milwaukee, and naturally most of their inbound tonnage is received, and most of their outbound tonnage is shipped over the Milwaukee under fabrication-in-transit privileges. The Milwaukee has more liberal fabrication-in-transit rules which justify the use of this railroad on both inbound and outbound shipments. Apparently the Commission was misled by the contentions of the Northern Lines that iron or steel may be routed into Sioux Falls over the Illinois Central or the Burlington-Great Northern, be fabricated thereat, and reshipped under the Milwaukee transit tariff to the Pacific Coast over the Milwaukee direct or over the Milwaukee-Union Pacific-Southern Pacific. As the Commission is aware, the transit tariff of the inbound carrier, and not the outbound carrier, governs the granting of transit privileges under joint rates at Sioux Falls. The exclusive use of the Illinois Central and Great Northern instead of the Milwaukee for inbound shipments would merely shift the problem of the shipper from reaching S.P.&S. System points to reaching points on the Milwaukee.

Agricultural Implements.

The evidence showing a need for joint rates on westbound agricultural implements was presented on behalf of J. I. Case Company, Racine, Wisconsin, a common point on the Milwaukee. It has dealers in S.P.&S. System territory and very often avails itself of the privilege of stopping for partial unloading or storage in transit in connection with carload shipments of agricultural implements. Many of the cars go to more than one destination and the part unloading privilege is necessary in the distribution. The joint rates sought would be of benefit to this company. On a carload moving over the Milwaukee via Portland to Clatskanie, Oregon, on the S.P.&S., it was necessary to pay the local rate beyond Portland at a considerable excess cost in transportation due to the lack of joint rates applying to such a movement. This shipment had been stopped for partial unloading at St. Maries, Idaho, a local point on the Milwaukee.

The Case Company keeps a stock of goods in warehouses at Spokane and Portland in anticipation of future orders. If the proposed rates were established, it could store in transit at Spokane and be able to move outbound shipments to S.P.&S. System points as well as to Milwaukee points when moving into Spokane via the Milwaukee (R. 887-892).

When a shipper must store goods without knowledge of where or on what railroad delivery will be made, or when it becomes necessary to change the final destination after the shipment is enroute, the need for a through route at competitive joint rates via the Milwaukee to reach any and all of the shipper's 26 dealers on the S.P.&S. System becomes clear.

Livestock

Commission's summary of evidence:

"*Livestock.*—A livestock producer, engaged principally in sheep raising at Washtucna, Wash., the site of his winter range, testified in support of the complainant. His testimony is to the effect that sheep must be shifted from winter range to summer range in early May; that he sometimes summer grazes his sheep in the St. Maries area which is local to the Milwaukee and at the completion of summer grazing, lambs are ready for market. His sheep are transported by the S.P.&S. to the summer range for grazing in transit, and in the autumn, when they are ready for market, they are shipped by rail to Chicago. There are no through rates from Washtucna to Chicago over the S.P.&S. and the Milwaukee, with grazing in transit, and the combination rates applicable thereon increase the freight charges by about $40 per car over the charges that would accrue at the joint through rates sought. The witness estimated that he would market about 10 carloads of lambs in 1954.

"Evidence submitted on behalf of the Chicago Producers Commission Association indicates that the volume of sheep and lambs handled by this association annually totals from 1,300 to 1,800 carloads, which are received from many States, including Washington, Idaho, and Oregon, an important production area. This association is interested in greater production of sheep and lambs and the opening up, for that purpose of as many places as possible where feed is available. It has handled livestock produced in the Pacific Northwest for many years. Freight charges are deducted from the proceeds when livestock is sold at a public market, and are assumed by the producer.

"There is much unused grazing land on both of the northern lines, as well as on the Milwaukee, and the defendants contend that the privilege of grazing in transit under joint through rates has little or nothing to do with the selection by sheep raisers of the location

of summer ranges. To support this contention, it is shown that in 1954 the Great Northern moved 365 carloads through Spokane for summer grazing, and only 72 of these were from origins from which joint through rates applied to Chicago. Of the remainder, 127 carloads originated on the Great Northern, 158 on the Union Pacific, and 8 on the Milwaukee. In 1954, 599 carloads were shipped from summer-grazing areas on the Great Northern, and transit privileges were used on only 53 of these. It is admitted by the livestock producer at Washtucna that the selection of a summer range is governed by the conditions which he believes will produce the best lambs rather than the availability of transit arrangements.

"Producers of lambs located on the S.P.&S. can now graze in transit at ranges on either of the northern lines at joint through rates to Chicago, whereas those located on either of the northern lines or on the Milwaukee are restricted in so far as transit is concerned to shipments moved over the respective lines of the originating carrier.

"Many carloads of hogs are shipped annually from Sioux Falls to the Pacific Northwest. In 1953, there were 189 carloads shipped over the Milwaukee to Seattle, 22 carloads over the North Western-Northern Pacific, and 4 over the Great Northern. In the same year, 394 carloads were shipped to Portland over the North Western-Northern Pacific and the Great Northern. The evidence indicates that there are certain advantages in shipping over each route. Shipments moved out over the North Western or the Great Northern leave Sioux Falls in the late afternoon, and those over the Milwaukee leave about 7 a.m., but there is no comparison of the time in transit over the respective routes or what it would approximate over a route of the Milwaukee-S.P.&S. to Portland.

"On January 12, 1955, the Northern Pacific's train-schedules were amended so that shipments from Sioux Falls over the North Western-Northern Pacific route to Seattle and Portland would be handled in about 24 hours less time, and stops for feed and water were

reduced from three to two. On and between January 12 and March 31, 1954, there were shipped from Sioux Falls over the North Western-Northern Pacific route 32 carloads to Portland, none to Seattle, and none to Salem, whereas in the same period in 1955, after the schedules were changed, that route handled 48 carloads to Portland, 119 carloads to Seattle, and 14 carloads to Salem. There is also a two-feed route from Sioux Falls to Portland over the Great Northern to Sioux City, thence the Burlington and the Union Pacific." (R. 133-135.)

In denying livestock producers joint rates from S.P.&S. System origins to points on the Milwaukee and its connections via Spokane, which would permit grazing in transit along the Milwaukee, the Commission states: (1) that such shipments may now be stopped for grazing in transit on either the Great Northern or Northern Pacific at joint rates; and (2) that the selection of a grazing area is not controlled by the presence or absence of grazing in transit rates (R. 140-141).

Because the National Forest Service is curtailing the numbers of livestock on national reserves there is now competition among the growers to secure desirable range (R. 427). Extensive grazing areas are served by the Milwaukee in northern Idaho adjacent to the stations of St. Maries, Calder, Marble Creek, Avery and Falk on the main line, Santa, Fernwood, Clarkia, Bowville and Elk River on the Elk River branch, and Setters, Blanchard and Spirit Lake on the Metaline Falls branch, which runs north and east of Spokane. There are facilities for loading and unloading sheep at St. Maries, St. Joe, Calder, Marble Creek, Falk and Pocono. In the St. Joe National Forest, which is crossed by both main and branch lines of the Milwaukee, there are 43 grazing allotments with a capacity of 24,900 sheep or 3,758 head of cattle; on the Metaline Falls line, there are approximately 80,000 acres of grazing

area with a carrying capacity of approximately 7,500 sheep. These grazing areas are not carrying a full capacity of livestock at the present time. In 1954, it is estimated there were about 8,000 sheep grazed in the St. Joe National Forest which had a total capacity of 24,900 sheep (R. 1051-1054).

By reason of the refusal of the S.P.&S. System to establish joint rates with the Milwaukee the same as apply over the Northern Lines, a shipper of livestock originating on the S.P.&S. System, and grazing in transit along the Milwaukee, is subjected to a rate penalty of not merely $40.00 but as much as $76.64 per car (R. 1077). The fact that there are other considerations more compelling than this rate penalty governing the choice of a grazing site is no excuse for imposing such a penalty on the livestock producer, who is required to absorb the loss (R. 1115).

The Commission in its general discussion and conclusions overlooked joint rates on livestock westbound (R. 136-142). Although *after* this proceeding was instituted, the schedule over the North Western-Northern Pacific route to the North Pacific Coast was shortened from Sioux Falls by 24 hours, advantages inherent to the use of the Milwaukee's route, acknowledged by the Commission, including a morning departure, remain available to a Milwaukee shipper from Sioux Falls.

General.

The Commission stated that there is no contention that the present S.P.&S. routes in connection with the Northern Lines are not adequate for the traffic involved and that no finding is requested by the Milwaukee to that effect (R. 138). The Milwaukee charged in its complaint to the Commission that the S.P.&S. System is in violation of Sections 1(4), 3(1) and 3(4) of the Interstate Commerce Act. Only upon the raising of the affirmative de-

ference of short-hauling under Section 15(4), did the question of adequacy, efficiency and economy of the existing routes become material. Such issue, however, is not reached if any one of the Milwaukee's contentions in Points I, II or III hereof are sustained, for in that event, Section 15(4) is inapplicable. The Milwaukee, in its brief to the Commission, requested the finding that:

> "The proposed rates and routes are desirable in the public interest and are needed in order to provide adequate and more economic transportation."

Such a finding would fully meet the requirements of Section 15(4). The testimony and evidence establish the uneconomic nature and inadequacy of present rates and routes from the standpoint of the shipper, which is the only inadequacy which must be shown. *Pennsylvania R. Co.* v. *United States* (1945), 323 U. S. 588. Further, for shipments stopped at intermediate points on the Milwaukee in transit, and for shipments initially consigned to intermediate points on the Milwaukee and thereafter reconsigned to another point on the Milwaukee or its connections, there is no adequate service via the Northern Lines. As stated by Justice Frankfurter regarding similar shipments via the Rio Grande in his dissenting opinion in *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co.*, 351 U. S. 321, 342:

> "In both situations it is a fiction to speak of a single shipment on which the Union Pacific would be short-hauled should the proposed through route go into effect. The situation involves two separate shipments for which, under normal railroad practice, only the rate of a single continuous shipment over the whole route is charged. On neither of these shipments is Union Pacific being short-hauled because it is capable of performing neither. In this sense, Union Pacific service is of course not 'adequate'; it is non-existent."

It is apparent that the defendant S.P.&S. System has invoked the short-haul protection of Section 15(4) to relieve itself of dealing equitably and without discrimination with all shippers. Even if it could be invoked, Congress added a safeguard against such misuse. This was recognized by the Commission in *Helix Milling Co.* v. *Great Northern Ry. Co.* (1952), 287 I. C. C. 77, 86, in which the S.P.&S. attempted to prevent the establishment of through routes with its co-owners, the Northern Lines:

> "Section 15(4) of the act prohibits the establishment of through routes which short haul a railroad without its consent, unless the Commission finds that (*a*) the existing route or routes embracing the entire line of the railroad are unreasonably long; or (*b*) that the proposed routes are needed to provide adequate and more efficient or more economic, transportation. Concerning the second of these provisions, in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333, affirmed in *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, we said, at page 343:
>
> > "It rests within the power of carriers by insistence on their long hauls to place localities and shippers on the lines of other carriers or not on their direct lines at severe rate and competitive disadvantages and, as in the instant case, to deprive shippers of relatively equal opportunities to compete in markets served only by them. Carriers in many instances availed themselves of the right to their long haul, and the disadvantaged localities and shippers had no redress. It was to remedy that situation, apparently, that the second exception was added. The Commission was thereby given authority, when it finds that through routes are "needed in order to provide adequate and more efficient or more economic transportation," to require the establishment of such routes although they may short haul one or more of the participating carriers'."

In *Great Northern Ry. Co.* v. *United States* (1948), 81 F. Supp. 921, 925 (D. Del.), the court also quoted, with approval, from the *Stickell* case:

> "'It is not the province of railroads to determine what markets shall be available to sellers or buyers, or by * * * the maintenance of rate disadvantages to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce.' *D. A. Stickell & Sons, Inc.* v. *Alton Railroad Co.*, 255 I. C. C. 333, 337."

The Government defendants, before the District Court, relied upon the statement of Mr. Justice Frankfurter in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, *supra*, 351 U. S. at 336, that:

> "Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled."

It is such protection that the Milwaukee is seeking in this proceeding. In the *Denver & Rio Grande* case, the Rio Grande sought joint rates with the Union Pacific on traffic in which it normally did not participate, and hence was seeking no relief from short-hauling. To the extent the Rio Grande occasionally participated in Union Pacific traffic it received its maximum haul. In the present proceeding the Milwaukee regularly participates as an originating, terminating, or intermediate carrier of S.P.&S. traffic but is short-hauled on 11 of every 12 cars for distances of nearly 1500 miles between Spokane and the Twin Cities. On cars of lumber and forest products alone, originating on the S.P.&S. System and terminating on the Milwaukee in one year, the Milwaukee was short-hauled 2,032 out of 2,181 times (R. 3128-3139).

If the public interest requires protection of railroads

against short-hauling, it is being gravely abused by this treatment of the Milwaukee. The relief sought by the Milwaukee would in no way short-haul the S.P.&S. System which is guaranteed its maximum haul on every car interchanged with the Milwaukee at Spokane, but would give the shipper the right to choose at competitive rates between the route of the Milwaukee and the route of its strong competitors, the Northern Lines.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to the District Court with direction to issue the injunction and relief prayed by the plaintiffs in that Court.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Section 1(3)(b) of the Interstate Commerce Act, 49 U.S.C., Section 1(3)(b):

> "For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

Section 1(4) of the Interstate Commerce Act, 49 U.S.C., Section 1(4):

> "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reason-

able compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph, shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) of the Interstate Commerce Act, 49 U.S.C. Section 3(4):

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 13(1) of the Interstate Commerce Act, 49 U.S.C., Section 13(1):

"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15(1) of the Interstate Commerce Act, 49 U.S.C., Section 15(1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as de-

fined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3) of the Interstate Commerce Act, 49 U.S.C. Section 15(3):

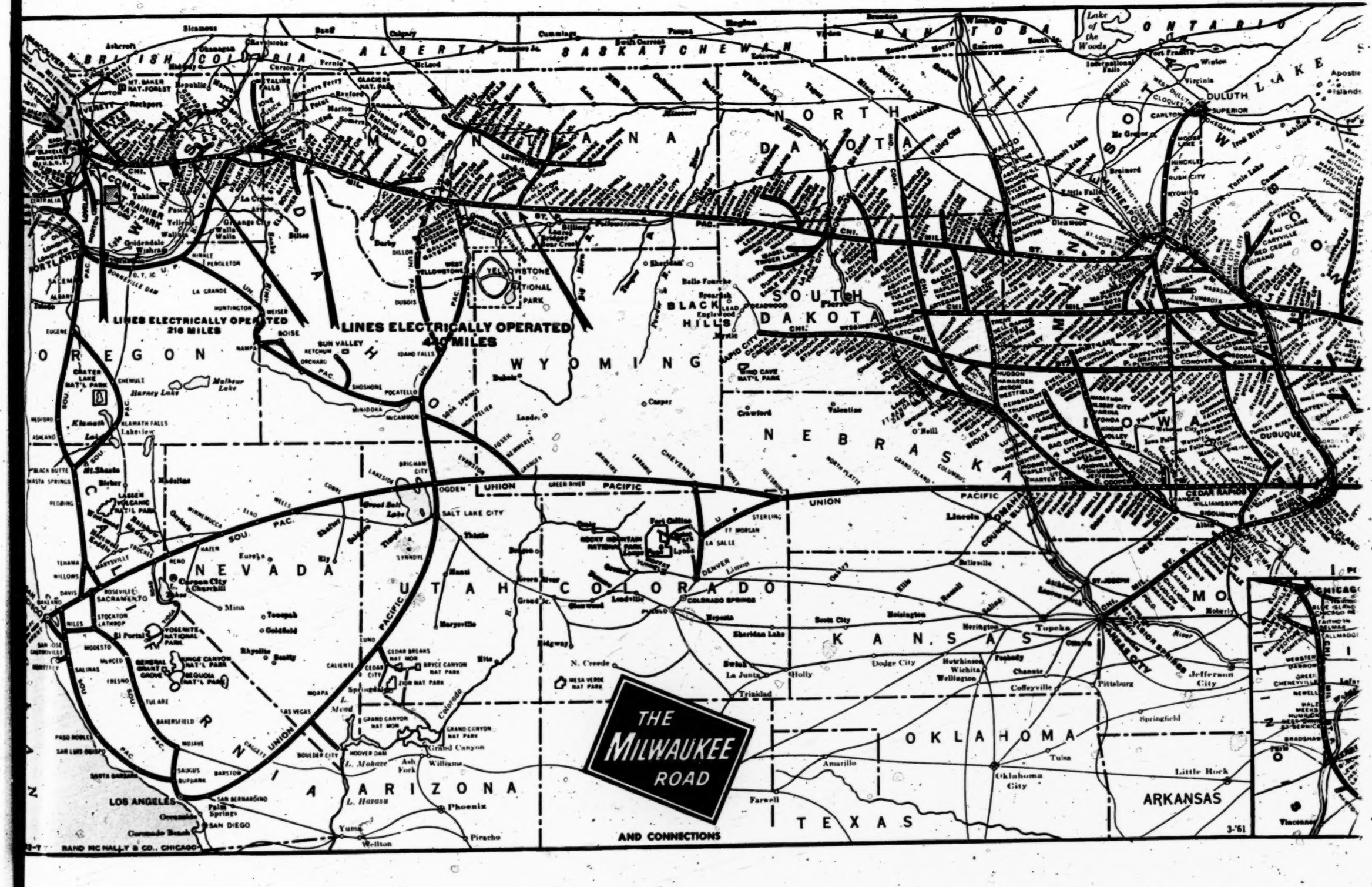
"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions

under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

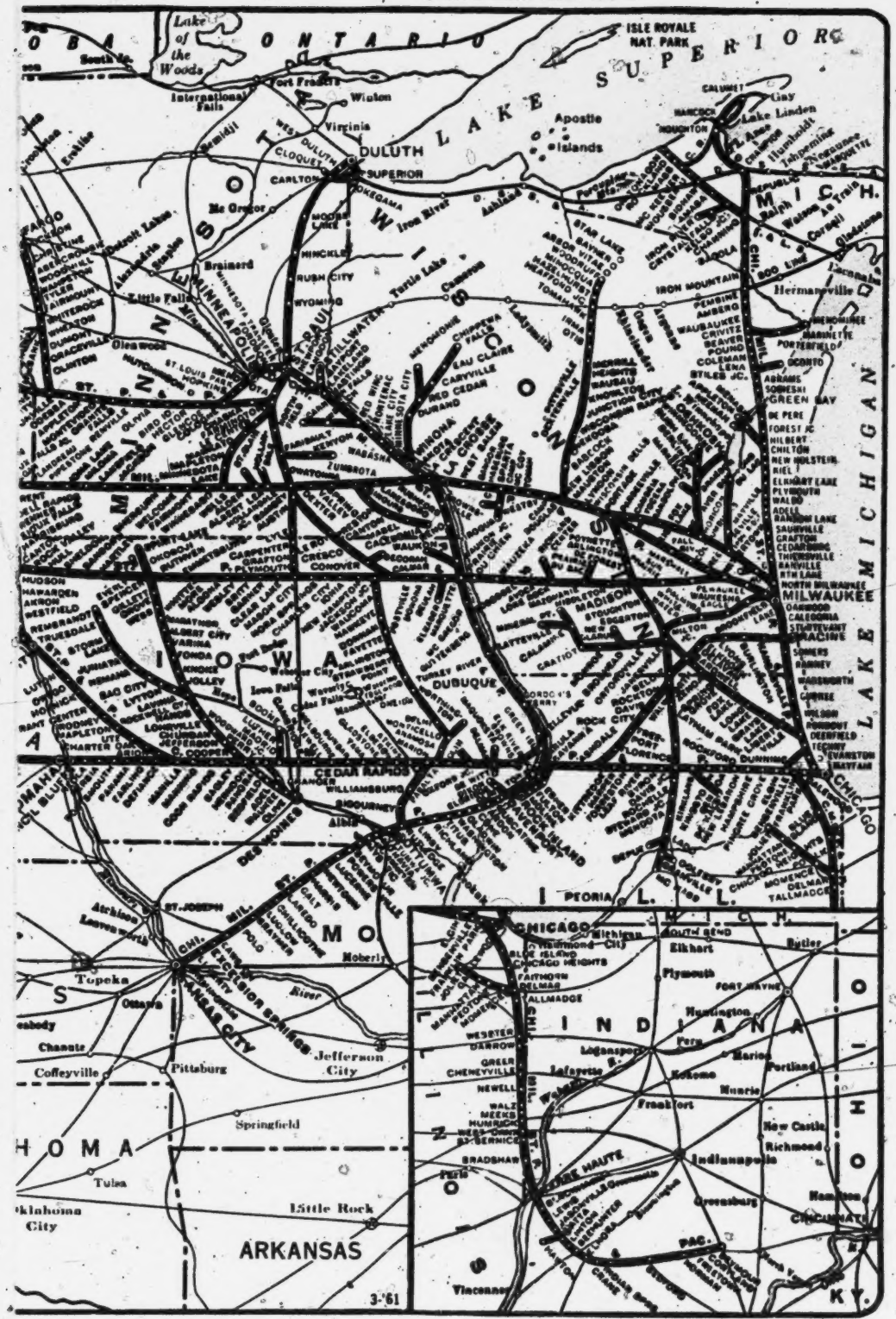
Section 15(4) of the Interstate Commerce Act, 49 U.S.C., Section 15(4):

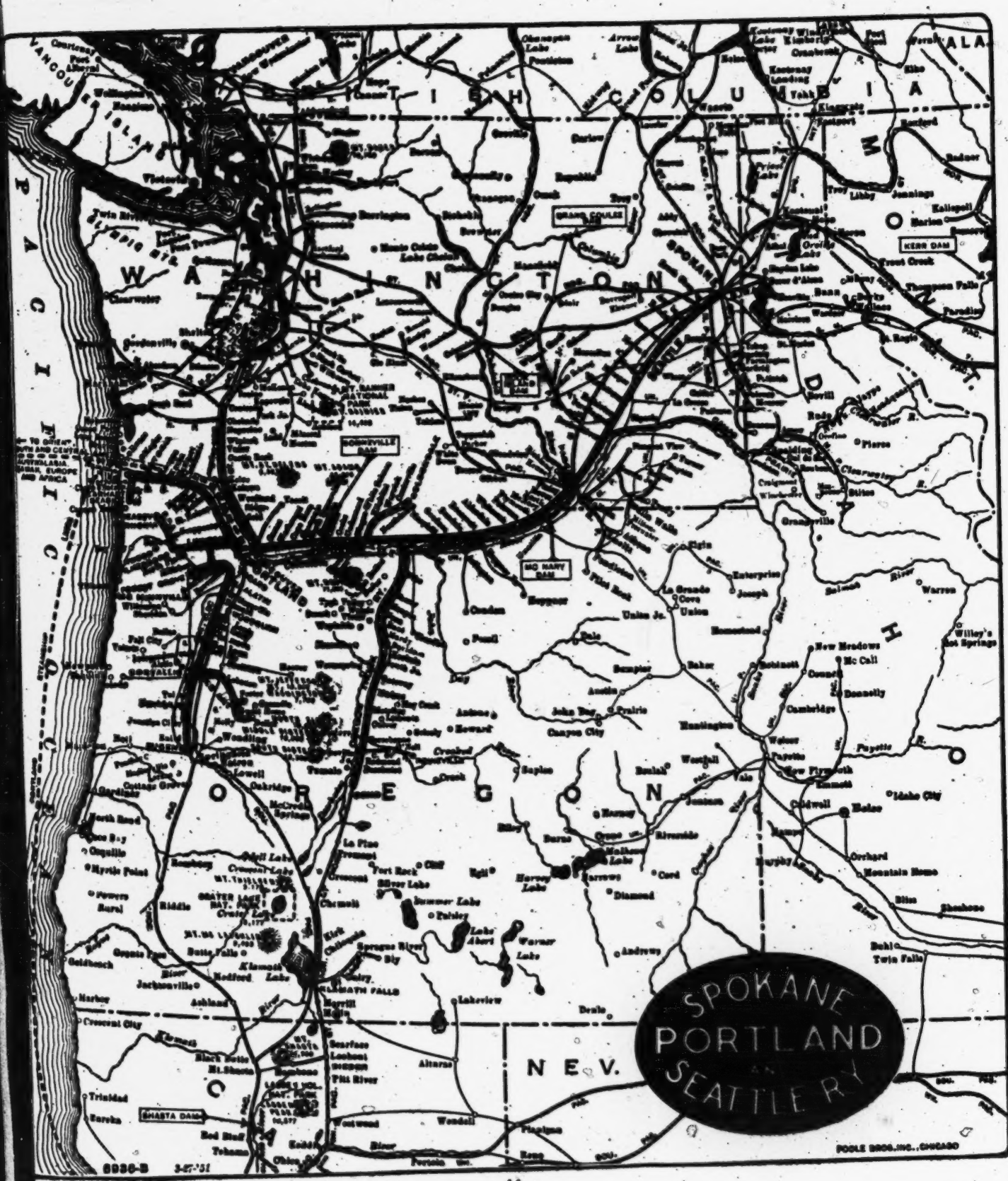
"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by

the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."


LINES ELECTRICALLY OPERATED
216 MILES
LINES ELECTRICALLY OPERATED
440 MILES
THE MILWAUKEE ROAD
AND CONNECTIONS
BRITISH COLUMBIA
ALBERTA
SASKATCHEWAN
MANITOBA
ONTARIO
WASHINGTON
OREGON
CALIFORNIA
NEVADA
IDAHO
MONTANA
NORTH DAKOTA
SOUTH DAKOTA
WYOMING
UTAH
COLORADO
NEBRASKA
KANSAS
OKLAHOMA
TEXAS
ARIZONA
NEW MEXICO
MINNESOTA
IOWA
MISSOURI
ARKANSAS
PACIFIC
UNION
SOUTHERN
GREAT NORTHERN
CHICAGO
ST. PAUL
DULUTH
MINNEAPOLIS
OMAHA
KANSAS CITY
CHICAGO
CEDAR RAPIDS
DUBUQUE
ST. LOUIS
SPRINGFIELD
JEFFERSON CITY
LITTLE ROCK
OKLAHOMA CITY
TULSA
AMARILLO
FARWELL
PHOENIX
LOS ANGELES
SAN DIEGO
SAN FRANCISCO
PORTLAND
SEATTLE
TACOMA
SPOKANE
BOISE
SALT LAKE CITY
DENVER
COLORADO SPRINGS
PUEBLO
BILLINGS
BUTTE
HELENA
FARGO
MINOT
BISMARCK
ABERDEEN
RAPID CITY
SIOUX FALLS
SIOUX CITY
OMAHA
LINCOLN
GRAND ISLAND
NORTH PLATTE
CHEYENNE
LARAMIE
ROCK SPRINGS
GREEN RIVER
OGDEN
RENO
LAS VEGAS
YUMA
EL PASO
ALBUQUERQUE
SANTA FE
WICHITA
TOPEKA
HUTCHINSON
DODGE CITY
HOLLY
TRINIDAD
LA JUNTA
GARDEN CITY
SCOTT CITY
HOISINGTON
ABILENE
SALINA
HUTCHINSON
WELLINGTON
COFFEYVILLE
PITTSBURG
JOPLIN
SPRINGFIELD
TULSA
OKLAHOMA CITY
AMARILLO
FARWELL
LITTLE ROCK
ARKANSAS
3-'61

APPENDIX B.


Lake of the Woods
ISLE ROYALE NAT. PARK
LAKE SUPERIOR
International Falls
Fort Frances
Winton
Virginia
Apostle Islands
DULUTH
SUPERIOR
Hermansville
LAKE MICHIGAN
MILWAUKEE
CHICAGO
MADISON
DUBUQUE
CEDAR RAPIDS
PEORIA
ST. JOSEPH
Topeka
Ottawa
Chanute
Coffeyville
Pittsburg
Springfield
Tulsa
Oklahoma City
Little Rock
ARKANSAS
Jefferson City
Moberly
Elkhart
South Bend
Plymouth
Huntington
Logansport
Peru
Marion
Portland
Kokomo
Muncie
Frankfort
New Castle
Richmond
Indianapolis
Terre Haute
Greensburg
Hamilton
Vincennes
3-'61


SPOKANE
PORTLAND
SEATTLE R
WASHINGTON
OREGON
IDAHO
NEV.
PACIFIC
COLUMBIA
GRAND COULEE
KERR DAM
BONNEVILLE DAM
MO NAVY DAM
SHASTA DAM
POOLE BROS. INC., CHICAGO